

1992

# Charles D. Kent v. Utah Department of Employment Security, Career Service Review board of the State of Utah : Brief of Respondent

Utah Court of Appeals

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K. Allan Zabel; Attorney for Respondents.

Phillip W. Dyer; Attorney for Petitioner.

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**BRIEF**

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920676 CA  
DOCKET NO. ~~IN THE UTAH~~ COURT OF APPEALS

CHARLES D. KENT,

Grievant/Petitioner,

vs.

Case No. 920676-CA

UTAH DEPARTMENT OF EMPLOYMENT  
SECURITY, and the  
CAREER SERVICE REVIEW BOARD  
OF THE STATE OF UTAH,

Argument Priority No. 13

Agency/Respondents.

**BRIEF OF RESPONDENTS**

**Petition for Review of a Decision and Order of the  
Career Service Review Board, An Administrative Agency of  
the State of Utah, Case Number 10 CSRB/H.O. 138  
(Step 5), 4 CSRB 40 (Step 6).**

PHILLIP W. DYER, ESQ.  
318 Kearns Building  
136 South Main Street  
Salt Lake City, Utah 84101

Attorney for Grievant/Petitioner  
Charles D. Kent

K. ALLAN ZABEL - 3598  
140 East 300 South  
Second Floor  
Salt Lake City, Utah 84111

Attorney for Agency/Respondent  
Department of Employment  
Security

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Utah Court of Appeals

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Mary T. Noonan

## TABLE OF CONTENTS

	Page(s)
JURISDICTION AND NATURE OF PROCEEDINGS BELOW.....	1
ISSUES PRESENTED FOR REVIEW.....	3
STATUTORY AND REGULATORY PROVISIONS AT ISSUE.....	4
STATEMENT OF THE CASE.....	5
STATEMENT OF THE FACTS.....	6
SUMMARY OF ARGUMENT.....	9
ARGUMENT.....	11
POINT I.....	11
THE COURT OF APPEALS WILL AFFIRM THE DECISION OF THE CAREER SERVICE REVIEW BOARD IF THERE IS A FACTUAL BASIS TO SUPPORT THE ALLEGATIONS OF THE EMPLOYING DEPARTMENT AND THE SANCTION OF DISMISSAL IS NOT DISPROPORTIONATE AS TO CONSTITUTE AN ABUSE OF DISCRETION.	
A.....	12
STANDARD OF REVIEW FOR FACTUAL FINDINGS.	
B.....	13
STANDARD OF REVIEW FOR AGENCY ABUSE OF DISCRETION	
POINT II.....	18
THE SANCTION OF DISMISSAL IMPOSED ON GRIEVANT WAS REASONABLE AND RATIONAL AND IS SUPPORTED BY THE EVIDENCE OF RECORD.	
POINT III.....	24
THE DECISION TO DISMISS GRIEVANT WAS A REASONABLE EXERCISE OF MANAGEMENT'S DISCRETION GIVEN THE FACTS AND CIRCUMSTANCES OF THIS CASE.	
CONCLUSION.....	28

## TABLE OF CONTENTS (Cont'd)

APPENDIX A - Determinative Statutes and Rules	
APPENDIX B - Decision of the Administrator	
APPENDIX C - References to the Record	

## TABLE OF AUTHORITIES

### CASES CITED

	Page(s)
<u>Civil Service Commission of City</u> <u>of Tucson v. Livingston</u> , 22 Ariz. App. 183, 525 P.2d 949, cert. denied 95 S.Ct. 1685, 421 U.S. 951, 44 L.Ed.2d 105 (1974).....	25
<u>Craddolph v. Ackerman</u> , 385 N.E.2d 1091, 1093 (Ohio App. 1978).....	28
<u>DeBry v. Salt Lake County Board of</u> <u>Appeals</u> , 764 P.2d 627 (Utah App. 1988).....	2
<u>Dept. of Air Force v. Swider</u> , 824 P.2d 448 (Utah App. 1991).....	13, 18
<u>Grace Drilling Co. v. Board of</u> <u>Review</u> , 776 P.2d 63, 67 (Utah App. 1989).....	18, 19
<u>Johnson v. Board of Review</u> , 842 P.2d 910 (Utah App. 1992).....	19
<u>King v. Industrial Commission</u> , 209 Utah Adv. Rep. 33 (Utah. App. 1993).....	13, 14
<u>Matter of Discharge of Jones</u> , 720 P.2d 1356 (Utah 1986).....	16
<u>Morton International, Inc. v. Auditing</u> <u>Division of the Utah State Tax</u> <u>Commission</u> , 814 P.2d 581 (Utah 1991).....	15



## TABLE OF AUTHORITIES (Cont'd)

### CASES CITED (Cont'd)

	Page(s)
<u>Ohline Corp. v. Granite Mill</u> , 208 Utah Adv. Rep. (Utah App. 1993).....	19
<u>Peatross v. Board of Commissioners of Salt Lake County</u> , 555 P.2d 281 (Utah 1976).....	3
<u>Semeco v. Utah State Tax Commission</u> , 209 Utah Adv. Rep. 73 (Utah 1993).....	13
<u>State v. Bowen</u> , 620 P.2d 72 (Utah 1980).....	27
<u>Stewart v. Board of Review</u> , 831 P.2d 134, 137 (Utah App. 1992).....	19
<u>Szmaciarcz v. California State Personnel Board</u> , 79 Cal. App.3d 904, 145 Cal.Rptr. 396, 405-406 (1978).....	17
<u>Utah Department of Corrections v. Despain</u> , 824 P.2d 439, 443 (Utah App. 1991).....	11,12,17,26,27

### STATUTES

Utah Code Ann. Section 63-46b-1 (1989 Supp.).....	1,2,5
Utah Code Ann. Section 63-46b-4 (1989 Supp.).....	5
Utah Code Ann. Section 63-46b-16 1989 Supp.).....	2,5,13,14,16
Utah Code Ann. Section 67-19-18(1) (1986 & Supp. 1992).....	3,4,15,27
Utah Code Ann. Section 67-19-30(2) (Supp. 1992).....	1,4

## **RULES**

	<b>Page(s)</b>
Utah Admin. Code R468-11-1 (Presently R477-11-1) (effective July 1, 1991).....	5,17
Utah Admin. Code R137-1-17.B. (1992).....	2,5
Utah Admin. Code R137-1-20 (1992).....	5,11

# IN THE UTAH COURT OF APPEALS

CHARLES D. KENT,

Grievant/Petitioner,

vs.

Case No. 920676-CA

UTAH DEPARTMENT OF EMPLOYMENT  
SECURITY, and the  
CAREER SERVICE REVIEW BOARD  
OF THE STATE OF UTAH,

Argument Priority No. 13

Agency/Respondents.

## BRIEF OF RESPONDENTS

### **JURISDICTION AND NATURE OF PROCEEDINGS BELOW**

As stated by Grievant/Petitioner at page 2 of his Brief, this case is an appeal from a final agency action of the Career Service Review Board. Utah Code Ann. Section 67-19-30(2) (Supp. 1992) provides that grievances based on dismissal from employment are governed by Utah Code Ann., Section 63-46b, Utah Administrative Procedures Act (UAPA). The Career Service Review Board (CSRB) has designated all of its adjudicative

proceedings as formal for purposes of UAPA Section 63-46b-4.  
See Utah Admin. Code R137-1-17.B. (1992).

Grievant/Petitioner Kent (Grievant) asserts in his Brief, page 1, that:

Utah Code Annotated 63-46b-16(1) (1953, as amended) confers jurisdiction upon the Supreme Court or other appellate Courts, as provided by statute, to review all final agency actions resulting from formal adjudicative proceedings. [Emphasis added.]

Grievant further asserts that Utah Code Ann. Section 78-2a-3(2)(a) (1992 & Supp. 1992) grants jurisdiction of this case to this Court.

UAPA Section 63-46b-1(8) (1989 & Supp. 1992), states:

Nothing in this chapter may be interpreted to provide an independent basis for jurisdiction to review final agency action.

This provision is consistent with the language of UAPA Section 63-46b-16(1), "As provided by statute . . .". Clearly, UAPA Section 63-46b-16(1), only becomes operational if some statute other than the UAPA confers jurisdiction on this Court.

This Court has previously held that U.C.A. Section 78-2a-3(2)(a) does not by itself confer jurisdiction on this Court to review final agency action. See DeBry v. Salt Lake County Board of Appeals, 764 P.2d 627 (Utah App. 1988), in which Jackson, J. speaking for the Court said, referring specifically to Section 78-2a-3(2)(a):

This general statute defines the outermost limits of our appellate jurisdiction,

allowing us to review agency decisions only when the legislature expressly authorizes a right of review. [Citations omitted.] It is not a catchall provision authorizing us to review the orders of every administrative agency for which there is no statute specifically creating a right to judicial review. In the absence of such a specific statute, we have no jurisdiction. [Emphasis added.]

Id., at pages 627-628.

Grievant may be entitled to seek an extraordinary writ under Rule 65B of the Utah Rules of Civil Procedure (URCP). See Peatross v. Board of Commissioners of Salt Lake County, 555 P.2d 281 (Utah 1976). But to this point Grievant has plainly failed to state a jurisdictional basis for his appeal.

The balance of this brief is written on the assumption that this Court may conclude it does in fact have jurisdiction apart from Rule 65B to consider Grievant's appeal.

#### ISSUES PRESENTED FOR REVIEW

The issues raised by Grievant are actually sub-issues of the primary issue. Respondent Department of Employment Security (Department) believes the issues should be stated as follows:

1. Can a State employee with career service status of Schedule B pursuant to U.C.A. Section 67-19-15(2)(b) (Supp. 1992) be terminated under U.C.A. Section 67-19-18 (Supp. 1992) and its implementing rules because of the employee's conviction of the crime of forging an

endorsement on a U.S. Treasury check issued against the Federal Social Security Fund?

- a. Did the CSRB abuse its discretion by affirming the Department's reliance on "professional standards"?
- b. Did the CSRB abuse its discretion by determining there was a nexus between Grievant's off-duty conduct and his employment?
- c. Did the CSRB abuse its discretion by holding that Grievant may be terminated from one position for misconduct that occurred while he held a different position in the Department?

Grievant has stated in his brief, at pages 2-3, that the standard of review for each of the foregoing issues requires "analysis for correctness". The Department disputes the standard of review urged by Grievant. The standard of review of CSRB cases will be discussed in depth in Point I of the Argument herein.

#### **STATUTORY AND REGULATORY PROVISIONS AT ISSUE**

The statutes and rules which are determinative of this matter are set forth verbatim in Appendix A, and include the following:

Utah Code Ann. Section 63-46b-1 (1991 Supp.).

Utah Code Ann. Section 63-46b-4 (1991 Supp.).

Utah Code Ann. Section 63-46b-16 (1991 Supp.).

Utah Code Ann. Section 67-19-18(1) (1986 & Supp. 1992).

Utah Code Ann. Section 67-19-30(2) (Supp. 1992).

Utah Admin. Code R468-11-1 (presently 477-11-1) (effective July 1, 1991).

Utah Admin. Code R137-1-17.B. (1992).

Utah Admin. Code R137-1-20 (1992).

Other references by Grievant to statutes or rules are not relevant to this case.

#### **STATEMENT OF THE CASE**

By notice dated October 4, 1991, Grievant's immediate supervisor advised Grievant that the supervisor intended to recommend to the Department Administrator, Mr. Floyd G. Astin, that Grievant be dismissed from his employment for cause. After conducting a pre-termination hearing, Mr. Astin issued a disciplinary decision dated December 3, 1991, terminating Grievant effective December 6, 1991. (See Appendix B)

Grievant advanced his grievance of the dismissal to Step 5 at the CSRB. A hearing was held before a CSRB hearing officer on February 7, 1992. The hearing officer issued a decision on March 31, 1992, upholding Grievant's dismissal from State employment.

Grievant then advanced his grievance to Step 6 at the CSRB. The CSRB adopted the findings of its hearing officer and upheld Grievant's dismissal by decision dated October 20, 1992. Grievant thereafter filed his Petition for Review with this Court.

### **STATEMENT OF THE FACTS**

Grievant's Statement of Facts is incomplete and contains two errors. The facts pertinent to this case and to the Grievant's termination are as follows:

Grievant was hired by the Department on October 9, 1984 as an Accountant, in a non-career status. Record at 293-294 (All notations hereafter prefixed by "R" refer to pages in the record which are set forth in numerical order in Appendix C.) On January 13, 1986, Grievant's employment status was changed to Career Service Schedule B. R. 296 In January 1989 Grievant was promoted to the position of Field Auditor. R. 308

Grievant's duties from the time of his hire until his promotion in January, 1989, consisted of collecting employer contributions and benefit overpayments owed to the Unemployment Insurance Fund, a trust fund created by U.C.A. Section 35-4-9 (1988). R. 308-310, 312-313, [Ag. Exh. 5 at R. 181] Upon promotion to the position of Field Auditor, Grievant assumed the additional duties to audit employers, verify quarterly wage



reports and assess employers for deficiencies in reported wages and contributions. R. 310, 312, [Ag. Exh. 6 at R. 182]

On May 1, 1991, Grievant was indicted by a Federal Grand Jury on ten (10) counts of fraudulently endorsing Social Security checks made out to his deceased father during a period in 1986. R. 316, 406 Grievant's immediate supervisor. Mr. Don Avery, learned about the indictment from a Department employee and asked Grievant if he was the person indicted by the Federal Grand Jury. R. 316-317 Grievant then explained to Mr. Avery what had transpired and "professed his innocence". R. 317 Mr. Avery thereupon restricted Grievant's duties (R. 317), placed him under close supervision (R. 318), advised him that a guilty plea or conviction could impact his employment (R. 319), and instructed Grievant to keep Mr. Avery informed of the progress of the case. R. 320

Grievant was placed on restricted duties pending the outcome of his case because Field Auditors hold a very high profile position in the Department. R. 318, line 23 through R. 319, line 10; R. 323, line 21 through R. 324, line 2 They continually handle trust fund monies, have access to employers' confidential financial information, and even quite often are given checkbooks by employers in which pre-signed blank checks are kept. R. 323-324.

Mr. Avery became the Chief of Contributions about the first of August, 1992, some time after the retirement of

Mr. Dean Kimber. R. 334-335 Despite having instructed Grievant in 1991 to keep Mr. Avery informed, Grievant failed to give any information to Mr. Avery unless and until Mr. Avery requested updates. R. 326-327, 414

Although Grievant alleges that he told Mr. Avery's predecessor, Mr. Dean Kimber, about an August 8 court date, Mr. Avery had been aware only that Grievant was scheduled for a court appearance "sometime in the fall", and was not informed of the scheduled court appearance for August 8, 1992, until another supervisor in the Department called him about it. R. 327 Grievant did not at any time prior to August 8, 1992, tell Mr. Avery about the scheduled court appearance, and in particular did not let Mr. Avery know of Grievant's intent to plead guilty. R. 327, 402

On August 8, 1993, Grievant pled guilty to one count of fraudulently endorsing a United States Treasury check dated September 3, 1986, in the amount of \$310. R. 329, 393, [GR. Exh. 3, at R. 164; AG. Exh. 2, at R. 176] On September 13, 1991, Mr. Avery addressed a letter to his supervisor in which he reported the fact of Grievant's guilty plea and concluded that if the offense did not justify termination that Grievant be transferred out of the Contributions Section. R. 330 [GR. Exh. 2, at R. 163]

After receiving verbal response to his letter, on October 4, 1991 Mr. Avery gave Grievant a notice of intent to

discipline through dismissal. R. 331, [Ag. Exh. 3, at R. 177] Grievant filed a written response to the notice of intent to discipline and thereafter Mr. Avery issued a recommendation to the Administrator, Mr. Floyd G. Astin, that Grievant be dismissed for cause. R. 332

On November 15, 1991 Mr. Floyd Astin conducted a Step 4 informal pre-termination hearing with Grievant to hear Grievant's response to Mr. Avery's recommendation of dismissal. R. 333, 354 The result of the hearing was a written decision by Mr. Astin, issued on December 3, 1991, in which Mr. Astin concluded that Grievant's "act of forgery and failure to communicate openly and honestly" with his supervisor had disabled Grievant from being able to work effectively as an employee of the Department. R. 354-356, [Ag. Exh. 1, at R. 173]

Grievant thereafter pursued his appeal rights with the CSRB and this Court.

#### **SUMMARY OF ARGUMENT**

Whether this appeal comes to the Court as an appeal of right or as a Rule 65B petition for extraordinary writ because of a lack of other adequate remedy at law, the standard of review on the factual findings is that such findings will be upheld if they are supported by substantial evidence when the record is reviewed as a whole.

The Court will determine whether the sanctions imposed by the Department on the employee were disproportionate to the offense by considering whether the Department abused its discretion. The standard of review for determining whether there was an abuse of discretion is the intermediate standard. That is, the Court will affirm the employee's dismissal if that sanction is reasonable and rational under the circumstances of the case.

The findings of fact at Step 4 (the Administrator's decision), Step 5 (the hearing officer's decision), and Step 6 (the CSRB's decision) are supported by substantial evidence in the record. Those findings are sufficient to justify the sanction of dismissal.

The Grievant had actual or constructive notice of the conduct that was expected of him. His conduct, both at the time he committed the crime of forgery and when he failed to inform his supervisor of the progress of the federal criminal case, caused the Department to lose confidence and trust in Grievant. This loss of confidence and trust was directly related to Grievant's employment and occurred while he held positions for which such confidence and trust are vital. His dismissal from State service was appropriate.

## ARGUMENT

### POINT I

THE COURT OF APPEALS WILL AFFIRM THE DECISION OF THE CAREER SERVICE REVIEW BOARD IF THERE IS A FACTUAL BASIS TO SUPPORT THE ALLEGATIONS OF THE EMPLOYING DEPARTMENT AND THE SANCTION OF DISMISSAL IS NOT DISPROPORTIONATE AS TO CONSTITUTE AN ABUSE OF DISCRETION.

This Court has recently stated that:

The CSRB's role in examining the Department's personnel actions is a limited one. The CSRB is restricted to determining whether there is factual support for the Department's charges against [grievant] and, if so, whether the Department's sanction of dismissal is so disproportionate to those charges that it amounts to an abuse of discretion.

Utah Department of Corrections v. Despain, 824 P.2d 439, 443 (Utah App. 1991). This conclusion by the Court was based, in part, on a rule of the CSRB found at Utah Admin. Code R665-1-25.4 (1987-88), which at the time of the Despain decision required the CSRB hearing officer to "give latitude and deference" to the agency's decision.

The rule applicable to this case is found at Utah Admin. Code R137-1-20 (1992), which provides in part:

C. Evidentiary/Step 5 Hearing. An evidentiary/step 5 hearing shall be a new hearing for the record, with both parties being accorded full administrative due process. The hearing officer shall give latitude and consideration to an agency's prior decision when the latter is supported by the findings of fact based on the evidence. [Emphasis added.]

It should perhaps be noted that this rule was amended effective January, 1993, and is presently considerably more detailed than the version of the rule that appears in the 1992 Utah Admin. Code. However, the CSRB rule once again requires the CSRB hearing officer to "give deference" to the agency decision if the factual findings support the agency's allegations.

While the change in wording from "deference" to "consideration" and back to "deference" could be reviewed from the perspective of the dictionary meanings of the words, the history of the CSRB's rule and prior court decisions appear to make it plain that the role of the CSRB is limited to determining whether there is factual support for the agency's allegations and, if so, whether the agency abused its discretion in imposing the sanction of dismissal. See Despain, at pages 442-443.

Although Despain is not quite as clear on the role of the appellate courts in reviewing a CSRB decision, the outcome of Despain clearly demonstrates that this Court will apply the same standards to its review of a CSRB decision as the Court applies to the role of the CSRB in reviewing the Agency's decision.

#### **A. STANDARD OF REVIEW FOR FACTUAL FINDINGS.**

To determine whether there is factual support for a decision of the CSRB, this Court applies a "substantial

evidence" standard. See UAPA, Section 63-46b-16(4)(g). This standard has been stated as:

. . . [T]his court grants great deference to an agency's findings and will uphold them if they are "supported by substantial evidence when viewed in light of the whole record before the court". [Citation omitted.] "Substantial evidence" has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." [Citations omitted.] In applying the substantial evidence test, we review the "whole record" before the court, and consider both evidence that supports the Board's findings and evidence that fairly detracts from them. Id. It is the petitioner's duty to properly present the record, by marshaling all of the evidence supporting the findings and showing that, despite that evidence and all reasonable inferences that can be drawn therefrom, the findings are not supported by substantial evidence. [Citations omitted.]

Department of Air Force v. Swider, 824 P.2d 448, 451 (Utah App. 1991). Two very recent appellate court decisions confirm this standard. See King v. Industrial Commission, 209 Utah Adv. Rep. 33 (Utah App. 1993); and Semeco v. Utah State Tax Commission, 209 Utah Adv. Rep. 73 (Utah 1993).

#### **B. STANDARD OF REVIEW FOR AGENCY ABUSE OF DISCRETION.**

As stated above, the appellate courts of Utah will review the question of whether a sanction imposed by a State agency is so disproportionate to the charges against the employee as to amount to an abuse of discretion. The section of UAPA

applicable to this type of review is Section 63-46b-16(4)(h)(i).

Grievant suggests in his Brief that the appropriate standard of review is an "analysis for correctness". However, Grievant offers no explanation for that conclusion. Respondents believe the conclusion is in error for the reasons set forth in the following paragraphs.

It appears clear from the cases cited above that the appellate courts of this State have already determined that the imposition of sanctions against a State employee is a discretionary act. As such, the appellate courts will apply a standard of reasonableness and rationality to the exercise of such discretion. See King v. Industrial Commission, supra.

However, in Semeco the Supreme Court, through Howe, A.C.J., stated:

. . . But if there is no discernible legislative intent as to how a statute should be interpreted or applied, Morton suggests that a challenge to the interpretation or application of the statute could constitute a subsection (4)(h)(i) challenge and so receive intermediate review. Morton thus directs courts and attorneys to carefully consider whether a particular agency action constitutes a simple interpretation or application of law, reviewed under subsection (4)(d), or merely an exercise of implicitly delegated discretion to interpret or apply the law, reviewed under subsection (4)(h)(i).

209 Utah Adv. Rep., at pages 78-79.



The statutory provision itself, U.C.A. Section 67-19-18(1), appears on its face to contain an explicit grant of discretion to State agencies:

(1) Career service employees may be dismissed or demoted only to advance the good of the public interest, and for just causes such as inefficiency, incompetency, failure to maintain skills or adequate performance levels, insubordination, disloyalty to the orders of a superior, misfeasance, malfeasance, or nonfeasance in office. [Emphasis added.]

The language "such as" indicates a legislative intent not to limit application of the law only to the offenses enumerated. Furthermore, the offenses enumerated within the provision are subject to two or more interpretations, although past court decisions in Utah and other jurisdictions may provide considerable guidelines for such interpretations.

The Supreme Court, in its first detailed analysis of UAPA Section 63-46b-16, provided guidance that has become more clear as additional cases have developed. In Morton International, Inc. v. Auditing Division of the Utah State Tax Commission, 814 P.2d 581 (Utah 1991), the Court explained:

. . . When there is no discernible legislative intent concerning a specific issue the legislature has, in effect, left the issue unresolved. In such a case, it is appropriate to conclude that the legislature has delegated to the agency to decide the issue. Such an approach is particularly appropriate when it is reasonable to assume that the legislature intended the agency to have some discretion

in dealing with the statutory provision at issue. [Emphasis added.]

814 P.2d, at page 589.

That the legislature intended state agencies to have discretion in dealing with employees is almost self-evident. As pointed out by the Supreme Court in Matter of Discharge of Jones, 720 P.2d 1356 (Utah 1986), agencies have the responsibility to manage their employees:

The second Vetterli inquiry, whether the charges warrant the sanction imposed, is a limited one. The sheriff must manage and direct his deputies, and is in the best position to know whether their actions merit discipline. If the Merit Commission finds upon review that the facts support the charges against the deputy, then it must affirm the sheriff's disciplinary action, unless it finds the sanction so clearly disproportionate to the charges as to amount to an abuse of the sheriff's discretion. [Citation omitted; emphasis added.]

720 P.2d, at page 1363.

Given the language of the statute it seems rather obvious that its application is an exercise of delegated discretion to interpret and apply the law under UAPA Section 63-46b-16(4)(h)(i), and not just a simple interpretation or application of the law itself, under UAPA Section 63-46b-16(4)(d). Thus, the intermediate standard of review of reasonable and rational is appropriate for this case.

Furthermore, in defining the term "abuse of discretion" in the context of State employee grievances this Court quoted in Despain from a California case as follows:

[I]f the penalty imposed was under all the facts and circumstances clearly excessive, this will be deemed an abuse of discretion. . . . In determining whether there has been an abuse of discretion the Supreme Court of this state [California] has stated that "If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the [administrative body] acted within the area of its discretion."

824 P.2d, at page 448 [quoting from Szmeciarz v. California State Personnel Board, 79 Cal. App.3d 904, 145 Cal.Rptr. 396, 405-406 (1978).]

Finally, the rules of the Department of Human Resource Management (DHRM), which has the duty to oversee the implementation of the State Merit laws, has promulgated its rules, acknowledging the discretion agencies have in disciplining their employees. Specifically, Utah Admin. Code R468-11-2.(2)(d) (1991) provides:

(2)(d) Following such a hearing [the hearing before the agency head] an employee may be dismissed or demoted if the department head finds adequate cause or reason. [Emphasis added.]

See also Utah Admin. Code R468-11-1.(4) (1991).

As will be demonstrated in POINTS II and III of this Brief, the findings of the Administrator of the Department of Employment Security, the CSRB hearing officer, and the CSRB

itself, are supported by substantial evidence in the record, and the sanction imposed against the Grievant in this case, given all of the circumstances that exist in the case, was reasonable and rational.

## POINT II

**THE SANCTION OF DISMISSAL IMPOSED ON GRIEVANT WAS REASONABLE AND RATIONAL AND IS SUPPORTED BY THE EVIDENCE OF RECORD.**

Grievant was discharged for two reasons: First, he pled guilty to the crime of forging an endorsement on a U.S. Treasury check, which he committed while employed by the Department in a position involving collection of monies for the Unemployment Insurance Fund. Second, he failed to keep his supervisor informed about the progress of the federal criminal case against him, as he had been specifically instructed to do. Both the CSRB hearing officer and the CSRB itself agreed that there was substantial evidence to support the factual findings of the Department's Administrator.

When an appellant disagrees with the findings of fact of an agency, the appellant has the duty to marshal all of the evidence, both for and against the disputed findings. Grace Drilling Co. v. Board of Review, 776 P.2d 63, 67 (Utah App. 1989); Department of Air Force v. Swider, supra at 448, 451 In the instant case Grievant has set forth in his Brief a partial

partial statement of the facts, but has not identified specific findings which Grievant considers in dispute.

Instead, Grievant has simply stated his version of two key findings alleging that: 1) Grievant specifically told Dean Kimber about the August 8, 1991 court date at which Grievant pled guilty to fraud or forgery; and 2) an individual named Iturbe told Grievant that he, Iturbe, would "take care" of reporting to the Department about the outcome of the August 8 court hearing. Based on these "facts", Grievant argues that his dismissal was improper.

This Court has repeatedly said that it will not disturb findings of fact unless the appellant can demonstrate that the findings are not supported by substantial evidence. Stewart v. Board of Review, 831 P.2d 134, 137 (Utah App. 1992); Grace Drilling Co. v. Board of Review, supra; Johnson v. Board of Review, 842 P.2d 910 (Utah App. 1992). Compare Online Corp. v. Granite Mill, 208 Utah Adv. Rep. (Utah App. 1993).

With respect to Grievant's argument that he told the former Chief of Contributions about his August 8 court date, and that a Mr. Iturbe would "take care" of the reporting, the record is clear that even if these matters were true, they did not comply with the instructions Grievant was given by his own supervisor, Mr. Don Avery, to keep Mr. Avery informed of the progress of his case.

Mr. Avery testified in the Step 5 evidentiary hearing as follows:

Q. Did you ask Mr. Kent [Grievant] to keep you informed of the progress of the case against him?

A. Yes, I did. I asked him if -- if throughout this process, if he would keep me updated as to what was transpiring so that I was aware of -- of the situation. R. 320, lines 11-16

Q. At any time did he ever come to you and say, "I need to bring you up-to-date on my case," or anything to that effect?

A. Not once.

Q. In fact, you had to ask him every time what was going on?

A. Yes. R. 326, line 22, through R. 327, line 3

Q. But he did not come to you at any time prior to August 8th to let you know that he had a court date?

A. No, he did not. R. 327, lines 19-22

In addition, Mr. Astin, the Department Administrator, testified in the Step 5 hearing before the CSRB hearing officer that he asked Grievant why Grievant did not keep his supervisor informed about his case, and Grievant failed to explain why or that he informed anyone else:

Q. Did Mr. Kent ever state to you either in his hearing or at any other time that he had told the Chief of Contributions at that time, Mr. Dean Kimber, that he had an August 8th hearing date?

A. No. As a matter of fact, that did not come out. The questions were asked as to why he didn't inform his supervisor, and that was never mentioned he did inform anybody.

Q. Did Mr. Kent say to you at any time that he had told Mr. Kimber or anybody else that he intended to plead guilty at that August 8th date?

A. Again, that was asked and there was no indication of doing that. R. 379, line 21 through R. 380, line 9

Grievant did not at any time during his Step 5 hearing dispute Mr. Astin's testimony on this point, but only re-asserted his position that he kept Mr. Kimber informed. Grievant did admit in his own testimony, however, that he did not inform anyone of his decision to plead guilty in a plea bargain. See R. 402, lines 18-22

Grievant's testimony that he talked to Mr. Dean Kimber about his federal case caused Grievant's supervisor, Don Avery, a certain amount of frustration, as evidenced by Mr. Avery's testimony on Rebuttal in the Step 5 hearing:

Q. Again, what were your instructions to Mr. Kent about keeping you informed?

A. Please, keep me updated on the progress of the situation so that I'll know how to respond, I'll know how to react, so that nothing comes as a surprise to me.

Q Did you ask him to keep Mr. Kimber informed instead of --

A. No, I did not. I was his immediate supervisor. This thing should have been handled through me, unless Mr. Kimber had told me otherwise and I was not told such. R. 414, lines 1-12

Mr. Avery explained the impact Grievant's guilty plea and failure to keep Mr. Avery informed had on him and why he decided to recommend removal of Grievant from the Contributions Section in the following words:

Q. And why did you make that request?

A. It was obvious now that I cannot have an individual who had pled guilty to a federal offense of forgery handling trust fund monies. R. 330, line 25 through R. 331, line 3

Q. As far as the ultimate outcome prior to August 8th, did you have any reason to believe that Mr. Kent had, in fact, committed fraud against the Federal Government?

A. I did not. R. 350, lines 17-21

Q. And when he pled guilty, how did that change your attitude?

A. I quite honestly felt betrayed. R. 351, lines 2-4

Mr. Avery's testimony immediately following the excerpts quoted above went on to explain that the guilty plea and failure to keep Mr. Avery informed caused him to lose confidence in Grievant. See R. 351, line 8 through R. 352, line 4

Grievant asserts that he had no notice of any "professional standards" adopted by the Department. The focus of this argument is simply that the Grievant claims he did not understand what conduct was expected of him. The Department's Supervisor's Handbook is clear and unequivocal about what forms



of conduct may be cause for dismissal. The list of causes for dismissal clearly includes "Conviction of a crime of moral turpitude".

Grievant argues that he did not have access to the Supervisor's Handbook. He fails to address Mr. Astin's testimony that new employees are given information of what standards of conduct are expected of them, and that all employees have access to the Supervisor's Handbook. See R. 370, lines 16-25, and [GR. Exh. 1, at R. 116]

In addition, Mr. Avery testified that on more than one occasion he advised Grievant that a conviction or guilty plea could have an impact on Grievant's job. See R. 319, line 18 through R. 320, line 5

All of the foregoing quotations of testimony and references to exhibits show that the factual allegations of the Department are supported by substantial evidence in the record. Grievant has failed to marshal the evidence and demonstrate why any of the findings of the hearing officer or CSRB are not supported by the record. Under these circumstances the Court should conclude that the findings of fact are correct and supported by substantial evidence.

### POINT III

#### THE DECISION TO DISMISS GRIEVANT WAS A REASONABLE EXERCISE OF MANAGEMENT'S DISCRETION GIVEN THE FACTS AND CIRCUMSTANCES OF THIS CASE.

Grievant argues on appeal that the Department erred in dismissing Grievant for three reasons: 1) the Department has failed to prove it has adopted objective, identifiable professional standards; 2) there is no nexus between Grievant's guilty plea and his employment with the Department; and 3) Grievant's misconduct occurred while he served in a different "office" than the one from which he was dismissed.

The CSRB hearing officer addressed the first issue, whether Grievant violated a known standard of conduct, and concluded:

It seems to be generally understood that an employee's reputation for honesty and trustworthiness must be without question. This is especially true in a sensitive position such as Grievant's where trust fund moneys are involved.

Hearing Officer's decision, R. 7.

The CSRB addressed the same issue in the following manner:

It is not relevant that Appellant [Grievant] had not received a copy of the Department's Supervisor Handbook prior to his dismissal. Proper conduct and professional standards include certain moral standards that do not need to be explicitly written and disseminated to each employee in the public work force. A serious offence in criminal law, such as forgery, for one who holds a position such as an Accountant, a Collections Officer, and a Field Auditor, rises to a level of

moral turpitude. . . . Clearly a universal standard of truthfulness, integrity, trustworthiness, and a reputation not blemished by an act or acts of forgery may be expected of one holding the job title of "auditor". . . .

CSRB Decision, R. 271.

The Department's policy concerning dismissals for cause is clear. It does not conflict with any of the reasons set out in the statute. Conviction of a crime of moral turpitude is equally as serious if not more so than mere inefficiency or failure to maintain skills. It is synonymous with incompetency in the sense that by such a conviction one is rendered incompetent to perform his duties as such duties relate to handling monies that belong to a trust fund, or auditing employers for compliance with their legal obligations to that trust fund. Indeed, Black's Law Dictionary defines "incompetency" as "Lack of ability, legal qualification or fitness to discharge the required duty." [Emphasis added.]

As pointed out by the Arizona Court of Appeals, the very nature of the civil service employer/employee relationship makes it infeasible to spell out in detail all conduct which will result in discharge. Civil Service Commission of City of Tucson v. Livingston, 22 Ariz. App. 183, 525 P.2d 949, cert. denied 95 S.Ct.1685, 421 U.S. 951, 44 L.Ed.2d 105 (1974). It is sufficient if the employee has fair notice of the employer's policies either expressly, or fairly implied. Ibid.

The Department's policy is a matter of record. It is in complete conformance with DHRM's policies.

Concerning Grievant's argument that there is no nexus between his misconduct and his job with the Department, the Department contends that Grievant's guilty plea to the crime of forgery of a U.S. Treasury check, coupled with his failure to keep his supervisor informed of the progress of his case, caused the Department management to lose confidence in Grievant. This is particularly important when an employee holds a highly sensitive position that requires unquestioned trustworthiness and honesty. Grievant's conduct, both in committing the crime of forgery and of failing to keep his supervisor informed as instructed, rendered Grievant ineffective as an employee.

As stated by the Department's Administrator in his Step 4 decision:

Given the facts of your case, I have no alternative but to conclude that your act of forgery and failure to communicate honestly and openly with your supervisor has disabled you from continued effectiveness as an employee of the Department.

[Ag. Exh. 1, at R. 175]

Although Utah Department of Corrections v. Despain, supra, is not controlling in this case because Grievant herein was not a law enforcement officer, there is valuable instruction in Despain. For one thing, Grievant as both a Collections Officer

and as a Field Auditor, held positions of trust with fiduciary responsibilities to a trust fund. In addition, as in Despain, Grievant's failure to keep his supervisor informed of the status of the federal case against him was "directly relevant to the requirements of his position". 824 P.2d, at page 447.

Grievant argues that he cannot be dismissed for conduct that occurred prior to his appointment as a Field Auditor. This argument is based on the Utah case of State v. Bowen, 620 P.2d 72 (Utah 1980) and other cases cited by Grievant. Grievant acknowledges that Bowen and the other cases all involved elected officials, whereas Grievant was a State career service employee. That distinction is highly significant.

Grievant's reliance on U.C.A. Section 77-5-1 (1953) is misplaced. The dismissal of state career service employees is governed by Section 67-19-18. Although the language is similar in that both statutes conclude with the words "in office", the words obviously cannot have the same meaning for a career service employee as they do for an elected or appointed officer, because the career service employee is not appointed for a fixed term.

A case closely in point was decided by the Court of Appeals of Ohio in 1978. A secretary was hired by the Ohio Department of Health as a clerk-typist. Sometime after her hire she pled guilty to one count of theft by deception; she

had accepted welfare payments to which she was not entitled.

The court held:

. . . The phrase "in office" means acts which occur while the officer or employee in the classified service is employed and not such acts occurring before the officer or employee becomes employed.

Craddolph v. Ackerman, 385 N.E.2d 1091, 1093 (Ohio App. 1978).

The Ohio court also found sufficient nexus existed because the secretary's duties included handling confidential medical documents, thus requiring honesty and trustworthiness. Id., 385 N.E.2d at page 1092.

In addition, the Administrator's decision relied not only on Grievant's conviction as grounds for dismissal, but also on Grievant's failure to "communicate honestly and openly" with his supervisor. This conduct occurred while Grievant was employed as a Field Auditor. Given these facts and circumstances, the Department did not abuse its discretion when it concluded that Grievant must be dismissed from State service.

#### CONCLUSION

Grievant held positions of trust with the Department: first as a Collections Officer, and later as a Field Auditor. While serving as a Collections Officer Grievant committed the crime of forging a U.S. Treasury check. Later, while working as a Field Auditor, Grievant pled guilty to a crime of moral

turpitude, forgery. Grievant failed to keep his supervisor informed of the progress of the criminal case against him, despite having been instructed to do so.

Under these circumstances the Department had no alternative but to dismiss Grievant from his employment. The decision of the CSRB affirming the Department's decision to dismiss Grievant should, itself, be affirmed.

Respectfully submitted this \_\_\_\_\_ day of April, 1993.

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K. Allan Zabel  
Attorney for Agency/Respondent  
Department of Employment  
Security

CERTIFICATE OF MAILING

I DO HEREBY CERTIFY that I mailed four copies of the foregoing Agency/Respondent's Brief, postage prepaid, to the following this \_\_\_\_\_ day of April, 1993:

Phillip W. Dyer, Esq.  
Attorney for Grievant/Petitioner  
Charles D. Kent  
318 Kearns Building  
136 South Main Street  
Salt Lake City, UT 84101

Robert N. White  
Administrator  
Career Service Review Board  
1120 State Office Building  
Salt Lake City, UT 84114

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## Section

- 63-46b-17. Judicial review — Type of relief.  
 63-46b-18. Judicial review — Stay and other temporary remedies pending final disposition.  
 63-46b-19. Civil enforcement.  
 63-46b-20. Emergency adjudicative proceedings.  
 63-46b-21. Declaratory orders.  
 63-46b-22. Transition procedures.

**63-46b-0.5. Short title.**

This act is known as the "Administrative Procedures Act."  
 1991

**63-46b-1. Scope and applicability of chapter.**

(1) Except as set forth in Subsection (2), and except as otherwise provided by a statute superseding provisions of this chapter by explicit reference to this chapter, the provisions of this chapter apply to every agency of the state of Utah and govern:

- (a) all state agency actions that determine the legal rights, duties, privileges, immunities, or other legal interests of one or more identifiable persons, including all agency actions to grant, deny, revoke, suspend, modify, annul, withdraw, or amend an authority, right, or license; and  
 (b) judicial review of all such actions.

(2) The provisions of this chapter do not govern:

- (a) the procedures for promulgation of agency rules, or the judicial review of those procedures or rules;

(b) the issuance of any notice of a deficiency in the payment of a tax, the decision to waive penalties or interest on taxes, the imposition of, and penalties or interest on, taxes, or the issuance of any tax assessment, except that the provisions of this chapter govern any agency action commenced by a taxpayer or by another person authorized by law to contest the validity or correctness of those actions;

(c) state agency actions relating to extradition, to the granting of pardons or parole, commutations or terminations of sentences, or to the rescission, termination, or revocation of parole or probation, to actions and decisions of the Psychiatric Security Review Board relating to discharge, conditional release, or retention of persons under its jurisdiction, to the discipline of, resolution of grievances of, supervision of, confinement of, or the treatment of inmates or residents of any correctional facility, the Utah State Hospital, the Utah State Developmental Center, or persons in the custody or jurisdiction of the Division of Mental Health, or persons on probation or parole, or judicial review of those actions;

(d) state agency actions to evaluate, discipline, employ, transfer, reassign, or promote students or teachers in any school or educational institution, or judicial review of those actions;

(e) applications for employment and internal personnel actions within an agency concerning its own employees, or judicial review of those actions;

(f) the issuance of any citation or assessment under Title 35, Chapter 9, Utah Occupational Safety and Health Act of 1973, and Title 58, Chapter 55, Utah Construction Trades Licensing Act, except that the provisions of this chapter govern any agency action commenced by the employer, licensee, or other person authorized by law to contest the validity or correctness of such a citation or assessment;

(g) state agency actions relating to management of state funds, and contracts for the purchase or sale of products, real property, supplies, goods, or services by or for the state, or by or for an agency of the state, except as provided in such contracts, or judicial review of those actions;

(h) state agency actions under Title 7, Chapter 1, Article 3, Powers and Duties of Commissioner of Financial Institutions, and Title 7, Chapter 2, Possession of Depository Institution by Commissioner, Title 7, Chapter 8a, Utah Industrial Loan Corporation Guaranty Act, Title 7, Chapter 19, Acquisition of Failing Depository Institutions or Holding Companies, and Title 63, Chapter 30, Governmental Immunity Act, or judicial review of those actions;

(i) the initial determination of any person's eligibility for unemployment benefits, the initial determination of any person's eligibility for benefits under Title 35, Chapter 1, Worker's Compensation, and Title 35, Chapter 2, Utah Occupational Disease Disability Law, or the initial determination of a person's unemployment tax liability;

(j) state agency actions relating to the distribution or award of monetary grants to or between governmental units, or for research, development, or the arts, or judicial review of those actions;

(k) the issuance of any notice of violation or order under Title 26, Chapter 8, Utah Emergency Medical Services System Act, Title 19, Chapter 5, Water Quality Act, Title 19, Chapter 4, Safe Drinking Water Act, Title 19, Chapter 2, Air Conservation Act, or Title 19, Chapter 6, Part 1, Solid and Hazardous Waste Act, except that the provisions of this chapter govern any agency action commenced by any person authorized by law to contest the validity or correctness of any such notice or order;

(l) state agency actions, to the extent required by federal statute or regulation to be conducted according to federal procedures;

(m) the initial determination of any person's eligibility for government or public assistance benefits;

(n) state agency actions relating to wildlife licenses, permits, tags, and certificates of registration;

(o) licenses for use of state recreational facilities; and

(p) state agency actions under Title 63, Chapter 2, Government Records Access and Management Act, except as provided in Section 63-2-603.

(3) The provisions of this chapter do not affect any legal remedies otherwise available to:

- (a) compel an agency to take action; or  
 (b) challenge an agency's rule.

(4) This chapter does not preclude an agency, prior to the beginning of an adjudicative proceeding, or the presiding officer during an adjudicative proceeding from:

(a) requesting or ordering conferences with parties and interested persons to:

- (i) encourage settlement;  
 (ii) clarify the issues;  
 (iii) simplify the evidence;  
 (iv) facilitate discovery; or  
 (v) expedite the proceedings; or

(b) granting a timely motion to dismiss or for summary judgment if the requirements of Rule 12(b) or Rule 56, respectively, of the Utah Rules

Department of Employment Security

of Civil Procedure are met by the moving party, except to the extent that the requirements of those rules are modified by this chapter.

(5) (a) Declaratory proceedings authorized by Section 63-46b-21 are not governed by this chapter, except as explicitly provided in that section.

(b) Judicial review of declaratory proceedings authorized by Section 63-46b-21 are governed by this chapter.

(6) This chapter does not preclude an agency from enacting rules affecting or governing adjudicative proceedings or from following any of those rules, if the rules are enacted according to the procedures outlined in Title 63, Chapter 46a, Utah Administrative Rulemaking Act, and if the rules conform to the requirements of this chapter.

(7) If the attorney general issues a written determination that any provision of this chapter would result in the denial of funds or services to an agency of the state from the federal government, the applicability of those provisions to that agency shall be suspended to the extent necessary to prevent the denial. The attorney general shall report the suspension to the Legislature at its next session.

(8) Nothing in this chapter may be interpreted to provide an independent basis for jurisdiction to review final agency action.

(9) Nothing in this chapter may be interpreted to restrict a presiding officer, for good cause shown, from lengthening or shortening any time period prescribed in this chapter, except those time periods established for judicial review. 1992

#### 63-46b-2. Definitions.

(1) As used in this chapter:

(a) "Adjudicative proceeding" means an agency action or proceeding described in Section 63-46b-1.

(b) "Agency" means a board, commission, department, division, officer, council, office, committee, bureau, or other administrative unit of this state, including the agency head, agency employees, or other persons acting on behalf of or under the authority of the agency head, but does not mean the Legislature, the courts, the governor, any political subdivision of the state, or any administrative unit of a political subdivision of the state.

(c) "Agency head" means an individual or body of individuals in whom the ultimate legal authority of the agency is vested by statute.

(d) "Declaratory proceeding" means a proceeding authorized and governed by Section 63-46b-21.

(e) "License" means a franchise, permit, certification, approval, registration, charter, or similar form of authorization required by statute.

(f) "Party" means the agency or other person commencing an adjudicative proceeding, all respondents, all persons permitted by the presiding officer to intervene in the proceeding, and all persons authorized by statute or agency rule to participate as parties in an adjudicative proceeding.

(g) "Person" means an individual, group of individuals, partnership, corporation, association, political subdivision or its units, governmental subdivision or its units, public or private organization or entity of any character, or another agency.

(h) (i) "Presiding officer" means an agency head, or an individual or body of individuals

agency's rules, or by statute to conduct an adjudicative proceeding.

(ii) If fairness to the parties is not compromised, an agency may substitute one presiding officer for another during any proceeding.

(iii) A person who acts as a presiding officer at one phase of a proceeding need not continue as presiding officer through all phases of a proceeding.

(i) "Respondent" means a person against whom an adjudicative proceeding is initiated, whether by an agency or any other person.

(j) "Superior agency" means an agency required or authorized by law to review the orders of another agency.

(2) This section does not prohibit an agency from designating by rule the names or titles of the agency head or the presiding officers with responsibility for adjudicative proceedings before the agency. 1988

#### 63-46b-3. Commencement of adjudicative proceedings.

(1) Except as otherwise permitted by Section 63-46b-20, all adjudicative proceedings shall be commenced by either:

(a) a notice of agency action, if proceedings are commenced by the agency; or

(b) a request for agency action, if proceedings are commenced by persons other than the agency.

(2) A notice of agency action shall be filed and served according to the following requirements:

(a) The notice of agency action shall be in writing, signed by a presiding officer, and shall include:

(i) the names and mailing addresses of all persons to whom notice is being given by the presiding officer, and the name, title, and mailing address of any attorney or employee who has been designated to appear for the agency;

(ii) the agency's file number or other reference number;

(iii) the name of the adjudicative proceeding;

(iv) the date that the notice of agency action was mailed;

(v) a statement of whether the adjudicative proceeding is to be conducted informally according to the provisions of rules adopted under Sections 63-46b-4 and 63-46b-5, or formally according to the provisions of Sections 63-46b-6 to 63-46b-11;

(vi) if the adjudicative proceeding is to be formal, a statement that each respondent must file a written response within 30 days of the mailing date of the notice of agency action;

(vii) if the adjudicative proceeding is to be formal, or if a hearing is required by statute or rule, a statement of the time and place of any scheduled hearing, a statement of the purpose for which the hearing is to be held, and a statement that a party who fails to attend or participate in the hearing may be held in default;

(viii) if the adjudicative proceeding is to be informal and a hearing is required by statute or rule, or if a hearing is permitted by rule and may be requested by a party

ment that the parties may request a hearing within the time provided by the agency's rules;

(ix) a statement of the legal authority and jurisdiction under which the adjudicative proceeding is to be maintained;

(x) the name, title, mailing address, and telephone number of the presiding officer; and

(xi) a statement of the purpose of the adjudicative proceeding and, to the extent known by the presiding officer, the questions to be decided.

(b) When adjudicative proceedings are commenced by the agency, the agency shall:

(i) mail the notice of agency action to each party;

(ii) publish the notice of agency action, if required by statute; and

(iii) mail the notice of agency action to any other person who has a right to notice under statute or rule.

(3) (a) Where the law applicable to the agency permits persons other than the agency to initiate adjudicative proceedings, that person's request for agency action shall be in writing and signed by the person invoking the jurisdiction of the agency, or by his representative, and shall include:

(i) the names and addresses of all persons to whom a copy of the request for agency action is being sent;

(ii) the agency's file number or other reference number, if known;

(iii) the date that the request for agency action was mailed;

(iv) a statement of the legal authority and jurisdiction under which agency action is requested;

(v) a statement of the relief or action sought from the agency; and

(vi) a statement of the facts and reasons forming the basis for relief or agency action.

(b) The person requesting agency action shall file the request with the agency and shall send a copy by mail to each person known to have a direct interest in the requested agency action.

(c) An agency may, by rule, prescribe one or more printed forms eliciting the information required by Subsection (3)(a) to serve as the request for agency action when completed and filed by the person requesting agency action.

(d) The presiding officer shall promptly review a request for agency action and shall:

(i) notify the requesting party in writing that the request is granted and that the adjudicative proceeding is completed;

(ii) notify the requesting party in writing that the request is denied and, if the proceeding is a formal adjudicative proceeding, that the party may request a hearing before the agency to challenge the denial; or

(iii) notify the requesting party that further proceedings are required to determine the agency's response to the request.

(e) (i) Any notice required by Subsection (3)(d)(ii) shall contain the information required by Subsection 63-46b-5(1)(i) in addition to disclosure required by Subsection (3)(d)(ii) of this section.

(ii) The agency shall mail any notice required by Subsection (3)(d) to all parties, ex-

cept that any notice required by Subsection (3)(d)(iii) may be published when publication is required by statute.

(iii) The notice required by Subsection (3)(d)(iii) shall:

(A) give the agency's file number or other reference number;

(B) give the name of the proceeding;

(C) designate whether the proceeding is one of a category to be conducted informally according to the provisions of rules enacted under Sections 63-46b-4 and 63-46b-5, with citation to the applicable rule authorizing that designation, or formally according to the provisions of Sections 63-46b-6 to 63-46b-11;

(D) in the case of a formal adjudicative proceeding, and where respondent parties are known, state that a written response must be filed within 30 days of the date of the agency's notice if mailed, or within 30 days of the last publication date of the agency's notice, if published;

(E) if the adjudicative proceeding is to be formal, or if a hearing is to be held in an informal adjudicative proceeding, state the time and place of any scheduled hearing, the purpose for which the hearing is to be held, and that a party who fails to attend or participate in a scheduled and noticed hearing may be held in default;

(F) if the adjudicative proceeding is to be informal, and a hearing is required by statute or rule, or if a hearing is permitted by rule and may be requested by a party within the time prescribed by rule, state the parties' right to request a hearing and the time within which a hearing may be requested under the agency's rules; and

(G) give the name, title, mailing address, and telephone number of the presiding officer.

(4) When initial agency determinations or actions are not governed by this chapter, but agency and judicial review of those initial determinations or actions are subject to the provisions of this chapter, the request for agency action seeking review must be filed with the agency within the time prescribed by the agency's rules.

(5) For designated classes of adjudicative proceedings, an agency may, by rule, provide for a longer response time than allowed by this section, and may provide for a shorter response time if required or permitted by applicable federal law.

(6) Unless the agency provides otherwise by rule or order, applications for licenses filed under authority of Title 32A, Chapters 3, 4, and 5, are not considered to be a request for agency action under this chapter.

(7) If the purpose of the adjudicative proceeding is to award a license or other privilege as to which there are multiple competing applicants, the agency may, by rule or order, conduct a single adjudicative proceeding to determine the award of that license or privilege.

1988

#### 63-46b-4. Designation of adjudicative proceedings as formal or informal.

(1) The agency may, by rule, designate categories of adjudicative proceedings to be conducted infor-

formally according to the procedures set forth in rules enacted under the authority of this chapter if:

(a) the use of the informal procedures does not violate any procedural requirement imposed by a statute other than this chapter;

(b) in the view of the agency, the rights of the parties to the proceedings will be reasonably protected by the informal procedures;

(c) in the view of the agency, the agency's administrative efficiency will be enhanced by categorizations; and

(d) the cost of formal adjudicative proceedings outweighs the potential benefits to the public of a formal adjudicative proceeding.

(2) Subject to the provisions of Subsection (3), all agency adjudicative proceedings not specifically designated as informal proceedings by the agency's rules shall be conducted formally in accordance with the requirements of this chapter.

(3) Any time before a final order is issued in any adjudicative proceeding, the presiding officer may convert a formal adjudicative proceeding to an informal adjudicative proceeding, or an informal adjudicative proceeding to a formal adjudicative proceeding if:

(a) conversion of the proceeding is in the public interest; and

(b) conversion of the proceeding does not unfairly prejudice the rights of any party. 1987

#### 63-46b-5. Procedures for informal adjudicative proceedings.

(1) If an agency enacts rules designating one or more categories of adjudicative proceedings as informal adjudicative proceedings, the agency shall, by rule, prescribe procedures for informal adjudicative proceedings that include the following:

(a) Unless the agency by rule provides for and requires a response, no answer or other pleading responsive to the allegations contained in the notice of agency action or the request for agency action need be filed.

(b) The agency shall hold a hearing if a hearing is required by statute or rule, or if a hearing is permitted by rule and is requested by a party within the time prescribed by rule.

(c) In any hearing, the parties named in the notice of agency action or in the request for agency action shall be permitted to testify, present evidence, and comment on the issues.

(d) Hearings will be held only after timely notice to all parties.

(e) Discovery is prohibited, but the agency may issue subpoenas or other orders to compel production of necessary evidence.

(f) All parties shall have access to information contained in the agency's files and to all materials and information gathered in any investigation, to the extent permitted by law.

(g) Intervention is prohibited, except that the agency may enact rules permitting intervention where a federal statute or rule requires that a state permit intervention.

(h) All hearings shall be open to all parties.

(i) Within a reasonable time after the close of an informal adjudicative proceeding, the presiding officer shall issue a signed order in writing that states the following:

(i) the decision;

(ii) the reasons for the decision;

(iii) a notice of any right of administrative or judicial review available to the parties; and

(iv) the time limits for filing an appeal or requesting a review.

(j) The presiding officer's order shall be based on the facts appearing in the agency's files and on the facts presented in evidence at any hearings.

(k) A copy of the presiding officer's order shall be promptly mailed to each of the parties.

(2) (a) The agency may record any hearing.

(b) Any party, at his own expense, may have a reporter approved by the agency prepare a transcript from the agency's record of the hearing.

(3) Nothing in this section restricts or precludes any investigative right or power given to an agency by another statute. 1988

#### 63-46b-6. Procedures for formal adjudicative proceedings — Responsive pleadings.

(1) In all formal adjudicative proceedings, unless modified by rule according to Subsection 63-46b-3(5), the respondent, if any, shall file and serve a written response signed by the respondent or his representative within 30 days of the mailing date or last date of publication of the notice of agency action or the notice under Subsection 63-46b-3(3)(d), which shall include:

(a) the agency's file number or other reference number;

(b) the name of the adjudicative proceeding;

(c) a statement of the relief that the respondent seeks;

(d) a statement of the facts; and

(e) a statement summarizing the reasons that the relief requested should be granted.

(2) The response shall be filed with the agency and one copy shall be sent by mail to each party.

(3) The presiding officer, or the agency by rule, may permit or require pleadings in addition to the notice of agency action, the request for agency action, and the response. All papers permitted or required to be filed shall be filed with the agency and one copy shall be sent by mail to each party. 1988

#### 63-46b-7. Procedures for formal adjudicative proceedings — Discovery and subpoenas.

(1) In formal adjudicative proceedings, the agency may, by rule, prescribe means of discovery adequate to permit the parties to obtain all relevant information necessary to support their claims or defenses. If the agency does not enact rules under this section, the parties may conduct discovery according to the Utah Rules of Civil Procedure.

(2) Subpoenas and other orders to secure the attendance of witnesses or the production of evidence in formal adjudicative proceedings shall be issued by the presiding officer when requested by any party, or may be issued by the presiding officer on his own motion.

(3) Nothing in this section restricts or precludes any investigative right or power given to an agency by another statute. 1987

#### 63-46b-8. Procedures for formal adjudicative proceedings — Hearing procedure.

(1) Except as provided in Subsections 63-46b-3(d)(i) and (ii), in all formal adjudicative proceedings, a hearing shall be conducted as follows:

(a) The presiding officer shall regulate the course of the hearing to obtain full disclosure of relevant facts and to afford all the parties reasonable opportunity to present their positions.

(b) On his own motion or upon objection by a party, the presiding officer:

63-46b-16

## STATE AFFAIRS IN GENERAL

(b) Venue for judicial review of informal adjudicative proceedings shall be as provided in the statute governing the agency or, in the absence of such a venue provision, in the county where the petitioner resides or maintains his principal place of business.

(2) (a) The petition for judicial review of informal adjudicative proceedings shall be a complaint governed by the Utah Rules of Civil Procedure and shall include:

(i) the name and mailing address of the party seeking judicial review;

(ii) the name and mailing address of the respondent agency;

(iii) the title and date of the final agency action to be reviewed, together with a duplicate copy, summary, or brief description of the agency action;

(iv) identification of the persons who were parties in the informal adjudicative proceedings that led to the agency action;

(v) a copy of the written agency order from the informal proceeding;

(vi) facts demonstrating that the party seeking judicial review is entitled to obtain judicial review;

(vii) a request for relief, specifying the type and extent of relief requested;

(viii) a statement of the reasons why the petitioner is entitled to relief.

(b) All additional pleadings and proceedings in the district court are governed by the Utah Rules of Civil Procedure.

(3) (a) The district court, without a jury, shall determine all questions of fact and law and any constitutional issue presented in the pleadings.

(b) The Utah Rules of Evidence apply in judicial proceedings under this section. 1990

#### 63-46b-16. Judicial review — Formal adjudicative proceedings.

(1) As provided by statute, the Supreme Court or the Court of Appeals has jurisdiction to review all final agency action resulting from formal adjudicative proceedings.

(2) (a) To seek judicial review of final agency action resulting from formal adjudicative proceedings, the petitioner shall file a petition for review of agency action with the appropriate appellate court in the form required by the appellate rules of the appropriate appellate court.

(b) The appellate rules of the appropriate appellate court shall govern all additional filings and proceedings in the appellate court.

(3) The contents, transmittal, and filing of the agency's record for judicial review of formal adjudicative proceedings are governed by the Utah Rules of Appellate Procedure, except that:

(a) all parties to the review proceedings may stipulate to shorten, summarize, or organize the record;

(b) the appellate court may tax the cost of preparing transcripts and copies for the record:

(i) against a party who unreasonably refuses to stipulate to shorten, summarize, or organize the record; or

(ii) according to any other provision of law.

(4) The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:

(a) the agency action, or the statute or rule on which the agency action is based, is unconstitutional on its face or as applied;

(b) the agency has acted beyond the jurisdiction conferred by any statute;

(c) the agency has not decided all of the issues requiring resolution;

(d) the agency has erroneously interpreted or applied the law;

(e) the agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedure;

(f) the persons taking the agency action were illegally constituted as a decision-making body or were subject to disqualification;

(g) the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court;

(h) the agency action is:

(i) an abuse of the discretion delegated to the agency by statute;

(ii) contrary to a rule of the agency;

(iii) contrary to the agency's prior practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency; or

(iv) otherwise arbitrary or capricious. 1988

#### 63-46b-17. Judicial review — Type of relief.

(1) (a) In either the review of informal adjudicative proceedings by the district court or the review of formal adjudicative proceedings by an appellate court, the court may award damages or compensation only to the extent expressly authorized by statute.

(b) In granting relief, the court may:

(i) order agency action required by law;

(ii) order the agency to exercise its discretion as required by law;

(iii) set aside or modify agency action;

(iv) enjoin or stay the effective date of agency action; or

(v) remand the matter to the agency for further proceedings.

(2) Decisions on petitions for judicial review of final agency action are reviewable by a higher court, if authorized by statute. 1987

#### 63-46b-18. Judicial review — Stay and other temporary remedies pending final disposition.

(1) Unless precluded by another statute, the agency may grant a stay of its order or other temporary remedy during the pendency of judicial review, according to the agency's rules.

(2) Parties shall petition the agency for a stay or other temporary remedies unless extraordinary circumstances require immediate judicial intervention.

(3) If the agency denies a stay or denies other temporary remedies requested by a party, the agency's order of denial shall be mailed to all parties and shall specify the reasons why the stay or other temporary remedy was not granted.

(4) If the agency has denied a stay or other temporary remedy to protect the public health, safety, or welfare against a substantial threat, the court may not grant a stay or other temporary remedy unless it finds that:

Department of Employment  
Security

## PERSONNEL MANAGEMENT

67-19-18

**History:** C. 1953, 67-19-17, enacted by L. 1979, ch. 139, § 23.

**Meaning of "this act".** — See note under same catchline under § 67-19-11.

**Cross-References.** — Grievance and appeals procedure, dismissal of employee, placement on reappointment roster at discretion of board, § 67-19-25.

### **67-19-18. Dismissals and demotions — Grounds — Disciplinary action — Procedure — Reductions in force.**

(1) Dismissals or demotions of career service employees shall only be to advance the good of the public interest, and for such just causes as inefficiency, incompetency, failure to maintain skills or adequate performance levels, insubordination, disloyalty to the orders of a superior, misfeasance, malfeasance, or nonfeasance in office. There shall be no dismissal for reasons of race, sex, age, physical handicap, national origin, religion, political affiliation, or other non-merit factor including the exercise of rights under this chapter. The director shall promulgate rules governing the procedural and documentary requirements of disciplinary dismissals and demotions.

(2) If an agency head finds that a career service employee is charged with aggravated misconduct or that retention of a career service employee would endanger the peace and safety of others or pose a grave threat to the public interest, the employee may be suspended pending the administrative appeal to the department head as provided in Subsection (3).

(3) No person shall be demoted or dismissed from a career service position unless the department head or designated representative has observed the following procedures:

(a) The department head or designated representative notifies the employee in writing of the reasons for the dismissal or demotion;

(b) The employee has no less than five working days to reply and have the reply considered by the department head;

(c) The employee has an opportunity to be heard by the department head or designated representative; and

(d) Following the hearing an employee may be dismissed or demoted if the department head finds adequate cause or reason.

(4) Reductions in force required by inadequate funds, change of workload, or lack of work shall be governed by retention rosters established by the director. Under such circumstances:

(a) The agency head shall designate the category of work to be eliminated, subject to review by the director;

(b) Temporary and probationary workers shall be separated before any tenured employee;

(c) Retention points for each tenured employee shall be computed according to rules promulgated by the director allowing appropriate consideration for proficiency and for seniority in state government, including any active duty military service fulfilled subsequent to original state appointment. Tenured employees shall be separated in the order of their retention points, the employee with the lowest points to be discharged first; and

(d) A career service employee who is separated in a reduction in force shall be placed on the reappointment roster provided for in Subsection 67-19-17(2). He shall be reappointed without examination to any va-

67-19-18

## STATE OFFICERS AND EMPLOYEES

**67-19-18. Dismissals and demotions — Grounds — Disciplinary action — Procedure — Reductions in force.**

(1) Career service employees may be dismissed or demoted only to advance the good of the public interest, and for just causes such as inefficiency, incompetency, failure to maintain skills or adequate performance levels, insubordination, disloyalty to the orders of a superior, misfeasance, malfeasance, or nonfeasance in office.

(2) Employees may not be dismissed because of race, sex, age, physical handicap, national origin, religion, political affiliation, or other nonmerit factor including the exercise of rights under this chapter.

(3) The director shall establish rules governing the procedural and documentary requirements of disciplinary dismissals and demotions.

(4) If an agency head finds that a career service employee is charged with aggravated misconduct or that retention of a career service employee would endanger the peace and safety of others or pose a grave threat to the public interest, the employee may be suspended pending the administrative appeal to the department head as provided in Subsection (5).

(5) (a) No career service employee may be demoted or dismissed unless the department head or designated representative has complied with this subsection.

(b) The department head or designated representative notifies the employee in writing of the reasons for the dismissal or demotion.

(c) The employee has no less than five working days to reply and have the reply considered by the department head.

(d) The employee has an opportunity to be heard by the department head or designated representative.

(e) Following the hearing, the employee may be dismissed or demoted if the department head finds adequate cause or reason.

(6) (a) Reductions in force required by inadequate funds, change of workload, or lack of work are governed by retention rosters established by the director.

(b) Under those circumstances:

(i) The agency head shall designate the category of work to be eliminated, subject to review by the director.

(ii) Temporary and probationary employees shall be separated before any career service employee.

(iii) (A) Career service employees shall be separated in the order of their retention points, the employee with the lowest points to be discharged first.

(B) Retention points for each career service employee shall be computed according to rules established by the director allowing appropriate consideration for proficiency and for seniority in state government, including any active duty military service fulfilled subsequent to original state appointment.

(iv) A career service employee who is separated in a reduction in force shall be:

(A) placed on the reappointment roster provided for in Subsection 67-19-17(2): and



## PERSONNEL MANAGEMENT

67-19-19

(B) reappointed without examination to any vacancy for which the employee is qualified which occurs within one year of the date of the separation.

(c) (i) An employee separated due to a reduction in force may appeal to the department head for an administrative review.

(ii) The notice of appeal must be submitted within 20 working days after the employee's receipt of written notification of separation.

(iii) The employee may appeal the decision of the department head according to the grievance and appeals procedure of this act.

History: C. 1953, 67-19-18, enacted by L. 1979, ch. 139, § 24; 1983, ch. 332, § 9; 1991, ch. 204, § 5.

Amendment Notes. — The 1991 amendment, effective April 29, 1991, divided former Subsection (1) into present Subsections (1) through (3); redesignated former Subsections (2) through (4) as present Subsections (4) through (6); in Subsection (5), added the Subsection (a) designation and redesignated for-

mer Subsections (a) through (d) as present Subsections (b) through (e); in Subsection (6), added the (a), (b), (b)(iv)(A) and (B), and (c)(ii) and (iii) designations, added Subsection (b)(iii)(A), and redesignated former Subsections (a) through (e) as Subsections (b)(i), (b)(ii), (b)(iii)(B), (b)(iv) and (c)(i), respectively; and made minor stylistic and punctuation changes throughout the section.

## 67-19-19. Political activity of employees — Rules and regulations — Highway patrol — Hatch Act.

Except as otherwise provided by law or by rules promulgated under this section for federally aided programs, the following provisions apply with regard to political activity of career service employees in all grades and positions.

(1) State career service employees may voluntarily participate in political activity subject to the following provisions:

(a) if any state career service employee is elected to any partisan or full-time nonpartisan political office, that employee shall be granted a leave of absence without pay for times when monetary compensation is received for service in political office;

(b) no officer or employee in career service may engage in any political activity during the hours of employment, nor may any person solicit political contributions from employees of the executive branch during hours of employment for political purposes; and

(c) partisan political activity may not be a basis for employment, promotion, demotion, or dismissal, except that the director shall adopt rules providing for the discipline or punishment of a state officer or employee who violates any provision of this section.

(2) (a) Notwithstanding any other provision of this section, no member of the Utah Highway Patrol may use his official authority or influence for the purpose of interfering with an election or affecting the results of an election.

(b) No person may induce or attempt to induce any member of the Utah Highway Patrol to participate in any activity prohibited by this subsection.

(3) Nothing contained in this section may be construed to:

(a) preclude voluntary contributions by a state employee to the party or candidate of the officer's or employee's



## 67-19-19

## STATE OFFICERS AND EMPLOYEES

cancy for which the employee is qualified which occurs within one year of the date of the separation.

(e) An employee separated due to a reduction in force may appeal to the department head for an administrative review. The notice of appeal must be submitted within 20 working days after the employee's receipt of written notification of separation. The employee may appeal the decision of the department head according to the grievance and appeals procedure of this act.

**History:** C. 1953, 67-19-18, enacted by L. 1979, ch. 139, § 24; L. 1983, ch. 332, § 9.

**Amendment Notes.** — The 1983 amendment deleted "where funds have expired or work no longer exists" in the first sentence of Subsection (1); deleted "of personnel" after "director" in the last sentence of Subsection (1); deleted "of personnel management" after "director" in Subsection (4); added Subsection (4)(e); and made minor changes in phraseology and punctuation.

**Meaning of "this act".** — The term "this

act," referred to in the last sentence in Subsection (4)(e), literally means Laws 1983, ch. 332, §§ 1 to 9, which appear as various sections throughout this chapter (see Table of Session Laws in Parallel Tables volume). However, given the context in which it is used, it seems that the term is meant to refer to Laws 1979, ch. 139, §§ 1 to 35. See note under same catchline following § 67-19-11.

**Cross-References.** — Grievance and appeal procedure, § 67-19-25.

## COLLATERAL REFERENCES

**Am. Jur. 2d.** — 15A Am. Jur. 2d Civil Service §§ 52 to 90.

**A.L.R.** — Determination as to good faith in

abolition of public office or employment subject to civil service or merit system, 87 A.L.R.3d 1165.

## 67-19-20

## STATE OFFICERS AND EMPLOYEES

(b) permit partisan political activity by any state employee who is prevented or restricted from engaging in the political activity by the provisions of the federal Hatch Act.

**History:** C. 1953, 67-19-19, enacted by L. 1979, ch. 139, § 25; 1982, ch. 75, § 1; 1984 (2nd S.S.), ch. 17, 1; 1988, ch. 122, § 25.

**Amendment Notes.** — The 1988 amendment, effective April 25, 1988, substituted "that employee" for "such employee" in Subsection (1)(a); substituted "may any person" for "shall any person" in Subsection (1)(b); deleted "but nothing in this section shall preclude voluntary contributions by a state employee to the party or candidate of the officer's or employee's choice" at the end of Subsection (1)(b); substituted "may not" for "shall not" in Subsection (1)(c); deleted "of the Division of Personnel Management" following "director" in Subsec-

tion (1)(c); substituted "adopt rules" for "promulgate rules" in Subsection (1)(c); designated former Subsection (1)(d) as Subsection (2); substituted "Utah" for "State" before "Highway Patrol" in two places in Subsection (2); substituted "of an election" for "thereof" at the end of Subsection (2)(a); substituted "by this Subsection" for "herein" at the end of Subsection (2)(b); designated former Subsection (2) as (3); substituted "in this section may" for "herein shall" at the beginning of Subsection (3); inserted Subsection (3)(a); inserted subdivision designation (b) in Subsection (3); and made minor stylistic changes.

## COLLATERAL REFERENCES

**Utah Law Review.** — Eligibility of Public Officers and Employees to Serve in the State Legislature: An Essay on Separation of

Powers, Politics, and Constitutional Policy, 1988 Utah L. Rev. 295 (1988).

## 67-19-20 to 67-19-25. Repealed.

**Repeals.** — Laws 1989, ch. 191, § 22 repeals former § 67-19-20, as last amended by Laws 1983, ch. 301, § 2 and Laws 1983, ch. 320, § 81; and § 67-19-21, as last amended by Laws 1988, ch. 122, § 26, creating the Personnel Review Board and providing for the submission of charges under grievance and appeals procedure, effective April 24, 1989. Laws 1990, ch. 93, § 41 repeals § 67-19-21.1, as enacted by Laws 1987, ch. 161, § 284, relating to proce-

dures for adjudicative proceedings, effective April 23, 1990. Laws 1989, ch. 191, § 22 repeals §§ 67-19-22 to 67-19-24, as enacted by Laws 1979, ch. 139, §§ 28 to 30 and § 67-19-25, as last amended by Laws 1988, ch. 101, § 4 and Laws 1988, ch. 122, § 27, concerning grievance and appeals procedure, effective April 24, 1989. For present provisions, see Chapter 19a of this title.

## 67-19-28. Repealed.

**Repeals.** — Laws 1989, ch. 191, § 22 repeals § 67-19-28, as enacted by Laws 1979, ch. 139,

§ 34, providing for the merger of civil service systems prior to January 1, 1980.

## 67-19-30. Grievance resolution — Jurisdiction.

(1) Employees shall comply with the procedural and jurisdictional requirements of this section, Title 63, Chapter 46b, Administrative Procedures Act, and Title 67, Chapter 19a, Grievance and Appeal Procedures, in seeking resolution of grievances.

(2) All grievances based upon a claim or charge of injustice or oppression, including dismissal from employment, resulting from an act, occurrence, commission, or condition shall be governed by Title 67, Chapter 19a, Grievance and Appeal Procedures, and Title 63, Chapter 46b. Administrative Procedures

(3) All grievances involving classification or schedule assignment shall be governed by Section 67-19-31 and are designated as informal adjudicative proceedings as defined by Title 63, Chapter 46b, Administrative Procedures Act.

(4) All grievances by applicants for positions in state government involving an alleged discriminatory or prohibited employment practice shall be governed by Section 67-19-32 and Title 63, Chapter 46b, Administrative Procedures Act.

(5) A "grievance" under this chapter is a request for agency action for purposes of Title 63, Chapter 46b, Administrative Procedures Act.

**History:** C. 1953, 67-19-30, enacted by L. 1989, ch. 191, § 3; 1991, ch. 204, § 6; 1992, ch. 193, § 1.

**Amendment Notes.** — The 1991 amendment, effective April 29, 1991, inserted "Grievance and Appeal Procedures" following "Title 67" in Subsections (1) and (2), "are exempt from the procedures of" in Subsection (3), and made minor stylistic changes throughout the section.

The 1992 amendment, effective April 27, 1992, in Subsection (3), substituted "designated as informal adjudicative proceedings as defined by" for "exempt from the procedures of."

**Effective Dates.** — Laws 1989, Chapter 191 became effective on April 24, 1989, pursuant to Utah Const., Art. VI, Sec. 25.

### **67-19-31. Classification or position schedule assignment grievances — Procedure.**

(1) Upon receipt of a classification or position schedule assignment grievance, the administrator of the Career Service Review Board shall refer the grievance to the director.

(2) (a) The director shall assign the grievance to a classification panel of three or more impartial persons trained in state classification procedures.

(b) The classification panel shall determine whether or not the classification assignment was appropriate by applying the statutes, rules, and procedures adopted by the department that were in effect at the time of the classification or schedule change.

(c) The classification panel may:

(i) obtain access to previous audits, classification decisions, and reports;

(ii) request new or additional audits by department or agency personnel analysts; and

(iii) consider new or additional information.

(d) The classification panel may sustain or modify the original decision or make a new decision.

(e) The classification panel shall report its decision and findings to the director, who shall notify the grievant.

(3) (a) Either party may appeal the panel's decision to a classification committee appointed by the director.

(b) The director shall appoint a classification committee composed of three or more department directors representing both large and small agencies to hear the appeal.

(c) The classification committee shall review the classification and make the final agency decision. The final agency decision is subject to judicial review pursuant to the provisions of Section 63-46b-15.

987

**Administration****R477-11-2**

10-4.(3) The employee shall agree to repay any such assistance which was received for educational work completed in the year immediately preceding voluntary termination

10-4.(4) Education assistance shall not exceed \$1,500 in any one fiscal year. Agencies shall have the prerogative of approving program participation of any one employee up to and including \$1,500, but shall use contract requirements and standards approved by DHRM. Agencies which subsidize education of employees beyond the \$1,500 amount shall receive approval of the respective department head.

10-4.(5) When an agency directs an employee to participate in an educational program, then the agency shall fully pay the costs thereof.

KEY: educational tuitions, employee performance evaluation, employee productivity, human resources development, personnel management, training programs  
1991

67-19-6(5)

**R477-11. Discipline.**

R477-11-1. Disciplinary Action.

R477-11-2. Dismissal or Demotion.

**R477-11-1. Disciplinary Action.**

Noncompliance with these rules, departmental safety policies, professional standards adopted by a department, work place policies, and such matters as inefficiency, incompetency, failure to maintain skills, adequate performance levels, insubordination, disloyalty to the orders of a superior, misfeasance, malfeasance, nonfeasance in office, or failure to advance the good of the public interest shall be cause for disciplinary action. For purposes of R477-11, employee shall mean career service employee unless indicated otherwise.

11-1.(1) The type and severity of any disciplinary action taken shall be governed by principles of due process which include:

- (1)(a) Consistent application
- (1)(b) Prior knowledge of rules and standards
- (1)(c) Determination of fact
- (1)(d) Timely notice of noncompliance
- (1)(e) Opportunity to respond and rebut as defined herein

11-1.(2) If the agency determines that a career service employee is charged with aggravated or repetitive misconduct or that the retention of a career service employee would endanger the peace and safety of others or pose a grave threat to the public interest, the agency, pending an investigation to determine fact upon which disciplinary action may be taken, shall utilize one or more of the following options:

(2)(a) The employee may be placed on paid administrative leave (suspension with pay).

(2)(b) The employee may be temporarily reassigned to another position or different work location at the same rate of pay pending the completion of the investigation.

11-1.(3) In all cases, except as provided under Section 67-19-18(4) the disciplinary process includes the following:

(3)(a) The agency representative notifies the employee in writing of the proposed discipline and the

(3)(b) The employee has five working days within which to reply and have the reply considered by the agency representative before discipline is imposed;

(3)(c) If an employee waives the right to respond or does not reply within the time frames stated in these rules or as established by the agency representative, whichever is longer, discipline may still be imposed in accordance with these rules.

(3)(d) The employee and the agency representative may agree in writing to waive or extend any grievance step, or the time limits specified for any grievance step.

11-1.(4) After an employee has been informed of the reasons for the proposed discipline and has been given an opportunity to respond and be responded to, discipline may be imposed by the agency representative as appropriate. In determining the specific type and severity of the discipline to be taken, consideration may be given to such factors as the severity of the infraction, the repeated nature of violations, prior disciplinary/corrective actions, previous oral warnings, written warnings and discussions, the employee's past work record, the effect on agency operations, and the potential of the violations for causing damage to persons or property. Disciplinary action may include one or more of the following options:

(4)(a) Written reprimand.

(4)(b) Suspension of the employee without pay up to 30 calendar days per occurrence requiring discipline.

(4)(c) Demotion of the employee utilizing one of the following methods as provided by law:

1) An employee may be moved from a position in one class to a position in another class having a lower entrance salary if the duties of the position have been reduced for disciplinary reasons.

2) A demotion within the employee's current pay range may be accomplished by lowering the employee's salary rate back on the range, as determined by the department head or designee.

(4)(d) A department head shall dismiss or demote an employee only in accordance with the provision of Section 67-19-18 (5). See R477-11-2 of these rules.

(4)(e) Disciplinary actions are subject to the grievance and appeals procedure as provided by law.

11-1.(5) At the time disciplinary action is imposed the employee shall be notified in writing of the discipline, the reasons for the discipline, the effective date and length of the discipline and the standard of conduct necessary to avoid further discipline.

**R477-11-2. Dismissal or Demotion.**

An employee may be dismissed or demoted for cause as explained under R477- 10-2 and 11-1 of these rules as follows:

11-2.(1) A department head or appointing officer may dismiss an employee having other than career service status, without right of appeal, upon providing written notification to the employee specifying the reasons for the dismissal and the effective date.

11-2.(2) No employee shall be dismissed or demoted from a career service position unless the department head or designee has observed the following procedures and the Grievance Procedure Rules:

(2)(a) The department head or designee shall notify

**R137-1-15****Career Service Review Board**

272

**R137-1-15. Procedure For Grieving Reduction in Force.**

Grievances based upon a reduction in force shall be governed as follows:

A. Upon receiving the department head's final written decision, the employee may grieve that decision by filing a written request within 20 working days in the CSRB Office.

B. If timely and properly filed, the grievance shall be advanced to the evidentiary level/step 5 at the discretion of the administrator.

**R137-1-16. Jurisdictional Hearings.**

A. Procedural Issues. The administrator is empowered to determine the following:

1. timeliness, standing, direct harm, jurisdiction, and eligibility of the issues to be advanced, as well as any other procedural matters to be decided by the administrator; and

2. whether an employee has proper standing to process a claim.

B. Determination of Issues. The administrator shall determine which issues of a grievance may be heard at the evidentiary level. Those issues found to have been resolved at a lower level or those that do not qualify for advancement to the evidentiary level are precluded from further consideration in the grievance procedure.

C. Preclusion of Issues. Those issues not listed at Section 67-19a-302(1) are precluded from advancement to the evidentiary level. When the grievance issue is precluded from the evidentiary level, the matter under dispute shall be deemed as final at the level of the department head/step 4 written reply.

D. Reconsideration. Under Section 63-46b-13, a written request for reconsideration may be filed with the administrator within 30 days after the date that a jurisdictional hearing decision or an administrative review decision is issued.

E. Judicial Review. The aggrieved employee or the agency may appeal the administrator's decision to the Court of Appeals within 30 calendar days from the date of issuance of a written decision. Any petition for review to the Court of Appeals shall be pursuant to Section 63-46b-16.

F. Summary Judgment. The administrator may, pursuant to an administrative review of the procedural factors of a grievance case, summarily dispose of such case on grounds that: (1) the matter is untimely; (2) the grievant has failed to appear at the properly scheduled date, time, and place pursuant to written notice; (3) the grievant lacks standing; (4) the grievant has withdrawn or otherwise abandoned his grievance; (5) the grievant has not been directly harmed; (6) the issue grieved does not qualify to be advanced beyond step 4; or (7) the requested remedy or relief exceeds the scope of the grievance procedure.

G. Transcription and Transcript Fees. If a party appeals a jurisdictional hearing decision to the Court of Appeals or to District Court, the appealing party is responsible for paying all transcription costs and any transcript fees. The CSRB does not participate in the payment of such fees when appeals are taken to the courts. See Utah Rules of Appellate Procedure, Rule 11, and Utah Code Unannotated, Section 63-46b-16(2).

under the Utah Administrative Procedures Act.

**R137-1-17. Procedural Matters.**

The rules under this section pertain to jurisdictional and evidentiary level proceedings of the Career Service Review Board, not to appellate proceedings.

A. Conduct. The purpose of a hearing is to provide a fair and impartial opportunity to be heard so that the hearing officer may be completely informed in the matter and enabled to render a proper determination based on all the facts and applicable laws and rules.

B. Formal Adjudication. For purposes of Section 63-46b-4 of the Administrative Procedures Act, all adjudicative proceedings of the Career Service Review Board are to be construed as formal adjudicative proceedings.

C. Rules of Evidence/Procedure Inapplicable. The technical rules of evidence and the formal rules of civil procedure as observed in the courts of law are inapplicable to grievance procedure proceedings, except for the rules of privilege as recognized by law.

D. Expelling. The hearing officer may clear the proceeding of witnesses not under examination and may exclude any unruly or disruptive person.

E. Presentation of Case. Each party is given the opportunity to make an opening statement prior to presenting its case. At the appropriate time each party is given the opportunity to present evidence. After each party has presented its respective case, the moving party, followed by the responding party, may offer a closing statement. Each party may offer a brief rebuttal statement in the same order of presentation. Continuous rebuttal is not permissible.

F. Objections. When an objection is made as to the admissibility of evidence, the objection shall be noted for the record and a ruling made thereon or taken under advisement to be ruled upon later. The hearing officer has discretion to exclude inadmissible evidence or to order that cumulative evidence be discontinued; parties objecting to the introduction of evidence shall state the precise grounds of the objection at the time such evidence is offered.

G. Marking Exhibits. All exhibits shall be numerically marked in the order that they are received into evidence.

H. Motion to Dismiss. The hearing officer may, upon motion of the party present or upon his own motion, dismiss the grievance matter with due regard for the standard of excusable neglect, which standard is for good cause shown.

I. Consolidation of Grievances. Those grievances found to be the same or of a sufficiently similar context may be consolidated by the administrator for purposes of conducting a joint hearing to facilitate economy in expenses, time, and witnesses.

J. Standard of Proof. In all hearings, the standard of proof is the substantial evidence standard.

K. Hearsay Evidence. Hearsay evidence is admissible in grievance procedure proceedings pursuant to Section 63-46b-10(3).

L. Page Limitation. All written motions, pleadings, briefs, and memoranda for all Career Service Review Board proceedings shall not exceed 20 typed, double-spaced 8-1/2 x 11 inch pages, exclusive of any statement

page limitation provisions shall be timely filed in writing, and not in excess of ten double-spaced 8-1/2 x 11 inch pages. The applicant party has the burden to offer sufficient justification for requests in excess of 20 and 10 pages respectively to the Board for the granting of any exceptions to the page limitation rule.

2. The Board shall weigh all requests to exceed the page limitation rule based upon the reasonableness and necessity of such requests in light of each case and its circumstances. The Board may not automatically grant exceptions simply on the basis of a request.

#### **R137-1-18. Witnesses.**

A. Availability of State Employees To Testify. Every agency shall be responsible for making available any of its employees who are requested to testify in a hearing under these rules.

1. Off Duty Employees. Agencies are not responsible for making available employees who are off duty; on sick, annual or other approved leave; or who, for any other reason, are not at work during the time the hearing is in progress.

2. Nondisruption. The parties, their legal representatives, and the administrator shall make every effort possible to avoid disruption to the operation of state government in the calling of state employees to give testimony in hearings under these rules.

3. Witness List. All parties to a proceeding are to submit prior to the proceeding a list of witnesses expected to be called. This list is to be provided to all parties of record, and a copy is to be filed with the administrator. The witness list is to be offered at the prehearing conference.

4. Witness Failure. If a requested witness does not appear at the scheduled hearing, such failure to appear shall not necessitate the postponement of any proceedings.

5. Excessive Witnesses. If the number of witnesses requested seems excessive, the requesting party may be directed by the administrator to justify the request.

6. Witness Fees/State Employees. A witness fee is available to state employees who utilize nonworking hours and whose presence is required in a grievance procedure proceeding.

B. Hostile Witnesses. If a hearing officer determines that a witness is hostile or uncooperative, the witness may be examined by the party calling him as if under cross-examination. The party calling the witness may, upon showing that the witness was called in good faith but that the testimony is a surprise, proceed to impeach the witness by proof of prior inconsistent statements.

C. Exclusion/Sequestering Rule. The hearing officer may order that witnesses in any hearing be excluded, that is sequestered, so as to preclude any witness, other than the parties and their representatives, from hearing the testimony of any other witness. Witnesses not presently testifying may be excluded on motion by one or both parties. Witnesses are to be counseled not to discuss the case with other witnesses.

D. Management Representative. Prior to every hearing the agency's adjudicatory spokesman shall designate a management representative who is entitled to remain throughout the hearing to represent the agency at any proceeding. The grievant and the management representative may not be excluded from the hearing.

E. Witness Fees/Nonstate Employees. A nonstate employee called as a witness to a Career Service Review Board hearing shall be paid the same fee as mileage reimbursement that is paid to a witness in Utah's inferior courts.

#### **R137-1-19. Public Hearings.**

The parties shall be entitled to an open and public hearing unless the exclusionary rule is invoked or unless there are reasonable grounds to justify an executive session.

A. Closing Hearings. All grievance procedure hearings shall be open to the public, except for situations in which the administrator, the board, or the hearing officer closes by executive session either a portion of the hearing or the entire hearing when substantial reason exists for not having an open hearing.

1. An evidentiary/step 5 hearing may be closed in part or in its entirety when the proceeding involves questions about an employee's character, professional competence, or physical or mental health.

2. Authority to close meetings is set forth in the Utah Open and Public Meetings Act, Section 52-4-5(1).

B. Sealing Evidence. The administrator, the board, or the hearing officer may exercise authority to seal the record when circumstances so warrant.

C. Media Presence. All hearings at the evidentiary/step 5 and appellate/step 6 levels are open to the media, unless otherwise closed due to R137-1-19A above, except that television cameras shall not be permitted at the evidentiary/step 5 proceedings.

D. Dissemination. The administrator has discretion to release copies of legal decisions, orders, and rulings to a media representative upon the latter's request. Portions of or entire legal decisions and orders may be withheld if deemed to be of a privileged or confidential nature, or if the record is sealed.

#### **R137-1-20. Evidentiary/Step 5 Hearings.**

A. Authority of Hearing Officers. The hearing officer is empowered to:

1. maintain order, insure the development of a clear and complete record, rule upon offers of proof, and receive relevant evidence;

2. set reasonable limits on repetitive and cumulative testimony and exclude any witness whose later testimony might be colored by the testimony of another witness or any person whose presence might have a chilling effect on another testifying witness;

3. rule on motions, exhibit lists, and proposed findings;

4. require the filing of memoranda of law and the presentation of oral argument with respect to any question of law;

5. compel testimony and order the production of evidence and the appearance of witnesses; and

6. admit evidence that has reasonable and probative value.

B. Conduct of Hearings. A hearing shall be confined to those issues related to the subject matter presented in the original grievance statement.

1. An evidentiary proceeding shall not be allowed to develop into a general inquiry into the policies and operations of an agency.

2. An evidentiary proceeding is intended solely for the

purpose of receiving evidence which either refutes or substantiates specific claims or charges. It shall not be made an occasion for irresponsible accusations, general attacks upon the character or conduct of the employing agency or the employee or others, or for making derogatory assertions having no bearing on the claims or specific matters under review.

**C. Evidentiary/Step 5 Hearing.** An evidentiary/step 5 hearing shall be a new hearing for the record, with both parties being accorded full administrative due process. The hearing officer shall give latitude and consideration to an agency's prior decision when the latter is supported by the findings of fact based on the evidence.

**D. Discretion.** Upon commencement, the hearing officer shall announce that the hearing is convened and is henceforth on the record. The hearing officer shall note appearances for the record and shall determine which party has the burden of moving forward.

**E. Closing of the Record.** After all testimony, documentary evidence, and arguments have been presented, the hearing officer shall close the record and terminate the proceeding, unless one or both parties agree to submit a posthearing brief within a specified time.

**F. Posthearing Briefs.** When posthearing briefs or memoranda of law are scheduled to be submitted, the record shall remain open until the briefs are received by the hearing officer and incorporated into the record, or until the time to receive such briefs has expired. After receipt of posthearing documents, or upon the expiration of the time to receive posthearing documents, the case is then taken under advisement, and the tolling period commences for the issuance of the written decision.

**G. Findings of Fact, Conclusions of Law.** Following the closing of the record, the hearing officer shall make and enter a written decision containing findings of fact and conclusions of law. The decision and order is filed with the administrator and without further action becomes the decision and order of the evidentiary hearing.

**H. Disseminating Decisions.** The administrator shall disseminate copies of the decision and order to the persons of record for each party.

**I. Past Work Record.** In those proceedings where a disciplinary penalty is at issue, the past employment record of the employee is relevant for purposes of either mitigating or sustaining the penalty in the event that the employee is found guilty of the disciplinary charge alleged.

**J. Scope of Remedy/Relief.** If the hearing officer finds that the action complained of which was taken by the appointing authority was too severe, even though for good cause, the hearing officer may provide for such other remedy or relief as deemed appropriate and in the best interest of the respective parties.

**K. Compliance and Enforcement.** State agencies and officials are expected to comply with decisions and orders issued by a hearing officer, unless an appeal is taken to the appellate/step 6 level. Enforcement measures available to the board include: (1) involving the governor, who may remove most state officers with or without cause, and with respect to those who can only

damus order to compel the official to obey the order; and (3) the charge of a Class A misdemeanor.

**L. No Rehearings.** Rehearings are not permitted.

**M. Reconsideration.** A request for a reconsideration may be made in writing within ten working days after the date that an evidentiary/step 5 decision is received by the party. The written request is to contain specific reasons as to why a reconsideration is warranted with respect to the factual findings and conclusions of the evidentiary/step 5 decision. The original hearing officer shall decide on the propriety of a reconsideration. A request for reconsideration is filed with the administrator. Any appeal to the board from a reconsideration by the original hearing officer must be filed with the administrator within ten working days upon receipt of the reconsideration.

### **R137-1-21. The Board and the Appellate Procedure.**

**A. Transcript Production.** The party appealing the hearing officer's decision to the board at the appellate/step 6 level shall order production of the evidentiary/step 5 proceeding's transcript from the court reporter. The appellant shall share an equal payment with the CSRB Office to the court reporting firm.

1. Transcript production cost-sharing applies only to the appellant and to the CSRB Office. The former receives the transcript original; the latter receives a transcript copy.

2. The respondent may inquire of the CSRB Office about obtaining a transcript copy, or may directly purchase a copy from the court reporting firm.

**B. Briefs.** An appeal hearing before the board is based upon the evidentiary record previously established by the hearing officer. No additional or new evidence is permitted unless compelled by the board.

1. The appellant in a step 6 proceeding must obtain the transcript of the step 5 hearing. After receipt of the transcript, the appellant has a ten working-day period to file six copies of a brief with the administrator. Additionally, the respondent must be provided with a copy of the appellant's brief.

2. Upon receipt of a copy of the appellant's brief, the respondent then has a ten working-day period to file six copies of a reply brief with the administrator.

3. Briefs are distributed to board members upon receipt from both parties.

4. All briefs shall be hand delivered, sent by the U.S. Postal Service postage prepaid, or sent through the state's Central Mailing.

5. Briefs shall be date-stamped upon receipt in the CSRB Office.

6. The time frame for receiving briefs shall be modified or waived only for good cause as determined by the administrator.

**C. Rules of Procedure.** The following rules are applicable to appeal hearings before the board:

1. **Dismissal of Appeal.** Upon a motion by either party or upon its own motion, the board may dismiss any appeal prior to holding a formal appeal hearing if the appeal is clearly moot, without merit, not properly filed, or not within the scope of the board's authority.

2. **Notice.** Written notice of the date, time, place, and



DEPARTMENT OF EMPLOYMENT SECURITY  
of the Industrial Commission of Utah

Norman H. Bangerter  
Governor

Floyd G. Astin  
Administrator

140 East 300 South • P.O. Box 11249  
Salt Lake City, Utah 84147-0249  
(801) 536-7400  
FAX (801) 536-7420

December 3, 1991

Charles D. Kent  
Contributions & Collections

Dear Charles:

Disciplinary Decision

On October 4, 1991, Mr. Don Avery, Chief of Contributions, issued to you a Notification of Intent to Discipline, in which he advised you of his intent to recommend that you be disciplined by dismissal from this Department. You responded on October 23, 1991. On October 30, 1991, Mr. Avery advised you that he had considered your response and felt it necessary to recommend to the Administrator that you be dismissed from state service.

Upon receipt of Mr. Avery's recommendation of disciplinary action and your prior response to his intent letter, I carefully reviewed the information in both documents. You were subsequently notified that I would conduct a hearing on this matter on Friday, November 15, 1991. The hearing was held beginning at 2:00 p.m.

The issue in this matter is whether you should be dismissed from the Department and state service to advance the good of the public interest for noncompliance with professional standards adopted by this Department. Specifically, should you be dismissed for having been convicted of a crime of moral turpitude while employed by the Department?

Based on the information contained in Mr. Avery's Notification of Intent to Discipline and Recommendation for Disciplinary Action, and the additional information provided by you and Mr. Avery at the hearing, I hereby make the following:

Statement of Facts

1. On or about May 1, 1991, your supervisor, who at the time was Mr. Don Avery, learned that you had been indicted by a Grand Jury for the crime of



forgery. The charge arose from an allegation that you had forged the endorsement "Charles L. Kent" on a United States Treasury check. Charles L. Kent was your father. Mr. Kent had resided in your home for several years prior to his death.

2. When Mr. Avery asked you about your indictment, you advised him that you were innocent. You were temporarily reassigned to non-audit work within the Field Audit Unit until the indictment was cleared.
3. At the time Mr. Avery learned of your indictment, he asked you to keep him informed of the progress of your case because of the serious nature of the charges.
4. On August 8, 1991 you appeared before Judge David K. Winder in the United States District Court for the District of Utah, case number 91-NCR-34W, at which time you entered a plea of guilty to the criminal charge of forgery.
5. You did not communicate with Mr. Avery either before or after August 8, 1991, about your guilty plea, until Mr. Avery asked you about it.
6. On November 1, 1991, you were sentenced to five years of probation, ordered to make restitution in the amount of over \$18,000, and fined for the crime of forgery.

### Reasoning and Decision

The Department's Supervisor's Handbook (1990 edition, page 12-2) states that an employee may be dismissed if he is convicted of a crime of moral turpitude. The classification specification for the position of Field Auditor requires a Field Auditor to perform audits and investigations of employers and collect contributions, interest and penalties from employers. These functions have direct effect on the Unemployment Insurance Trust Fund. Employees who handle Trust Fund monies and audit employers must have high reputations of honesty and trustworthiness.

In our hearing you presented the defense that you are innocent of the charge of forgery, and that you only pled guilty on the advice of your attorney. You stated that you learned five years after your father's passing that his Social Security checks had been coming to your home. You further stated that you believe your brother may have forged the Social Security checks during all that time.

A plea of guilty is the equivalent of a conviction. Although you state that you are innocent, I am bound by what happened in criminal court. In addition, I find it very difficult to believe that your father's Social Security checks could come to your home for

a five-year period and that you had absolutely no knowledge of the matter. Concerning your belief that your brother may have forged the checks, you stated yourself that the federal handwriting expert expressed the opinion that your brother could not have done the forgery.

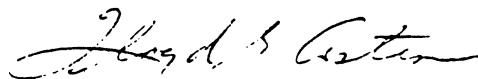
Perhaps equally important as your guilty plea was the fact that you failed to keep Mr. Avery informed of the progress of your case. You stated in the hearing that you didn't talk to Mr. Avery about your decision to plead guilty because a Department employee was in court when you entered your plea and you concluded that Mr. Avery would be told about it.

This failure to communicate occurred even though you were given specific instruction on the matter. In view of the instruction you were given and the importance of the matter to your job, I find it particularly difficult to understand why you would plead guilty to forgery without letting your supervisor or the Chief of Contributions know your intent. Your lack of communication and false denial on a matter so vital to both you and the Department naturally has caused management of this Department to lose confidence and trust in you.

Given the facts of your case, I have no alternative but to conclude that your act of forgery and failure to communicate honestly and openly with your supervisor has disabled you from continued effectiveness as an employee of the Department. Therefore, you are to be dismissed from the Department and state service for the good of the public interest pursuant to Section 67-19-18(1), Utah Code Annotated 1953, as amended. Your dismissal shall be effective at the close of business December 6, 1991.

If you disagree with this decision, you have 20 working days from the date hereof to file a grievance with the Career Service Review Board in accordance with its rules. You may contact Mr. Doug Olsen of this Department's Personnel Section or the Career Service Review Board, Room 1120, State Office Building, for further information concerning your right to grieve this decision.

Sincerely,



Administrator

ld/PC3  
CDKDSSML

his supervisor as an equally important cause for dismissal.

Grievant asserted that there were no specific rules of professional conduct delineated in the Department's rules and regulations and that, therefore, it was an error for the Department to cite the violation of professional policies as a reason for discipline. The Administrator testified, however, that he feels there is certain professional conduct that is "understood" in general by employees in positions such as Grievant's. It seems to be generally understood that an employee's reputation for honesty and trustworthiness must be without question. This is especially true in a sensitive position such as Grievant's when trust fund moneys are involved.

Grievant's supervisor and the Administrator testified that they considered the alternative of transferring Grievant to a different position where the issue of honesty and trustworthiness would not be so critical, but that another position was not available.

In summation, the Agency determined that Grievant's credibility had been damaged by his guilty plea and by his failure to communicate about the indictment process. It also determined that his conduct had constituted a violation of certain "understood" policies of professional conduct. The Agency further determined that it had lost confidence in Grievant's ability to function effectively in his present position, and that a realistic opportunity for transfer did not exist.

Taken altogether, these determinations constitute a finding that substantial evidence exists to support Agency's decision to discipline Grievant. The Agency followed its own policies by holding a hearing for Grievant, and it exercised its discretion reasonably by determining, from the hearing, that "adequate cause" existed for discipline.

#### **C. Time Period of Grievant's Actions**

Grievant asserts that the actions for which he was disciplined did not occur while he was in his current position, so that he should not properly have been disciplined for them. While it is true that the forgery occurred while he was in a former position, the guilty plea and the failure to communicate with his supervisor did occur while he was in his current position. The actions that led to the finding of "adequate cause or reason" occurred in a relevant and reasonable time period and were properly used as the basis for discipline.

#### **D. Nexus Requirement**

Grievant properly asserted that the Department has the burden to show the nexus between Grievant's misconduct and its detrimental effect on his job performance that would

A reduction in force is governed by the Department's work force adjustment plan. A copy of the plan will be available to all affected staff when reductions are necessary.

Retention points shall be calculated on all career employees by the length of continuous State service and a job proficiency score. An average of the last three annual performance ratings will be used as a proficiency score. When less than three ratings are available the average of those given will be used. Each employee's job proficiency score and length of service score shall be added together to produce the retention score.

The order of separation will be first temporary employees (TLNC), second probationary, and third tenured employees in order of their retention scores. In cases of a tie, the employee with the least seniority shall be released first.

Employees who are separated due to a reduction in force shall be given written notification of separation. They may appeal to the Administrator for review if the appeal is submitted within 10 working days from receipt of their written notification. The employee may appeal the Administrator's decision according to the appeal procedure of the Career Service Review Board.

A reinstated rif'd employee is not required to serve a probationary period and enjoys the rights and privileges of a regular career service employee.

### **Dismissals for Cause**

- Failure to satisfactorily complete probation period.
- Failure to report to work.
- Conviction of a crime involving moral turpitude.
- Negligence, inefficiency or unfitness to perform duties.
- Violation of Department or State regulations.
- Gross misconduct or insubordination.

Written notification from the Administrator specifying the reasons for the dismissal, and the effective date, must be given the employee.

The following procedures must be observed in dismissing or demoting employees having career service status:

1. The Administrator or designated representative shall notify the employee in writing of the reasons for the dismissal (or demotion).
2. The employee shall have at least five working days to reply and have the reply considered by the Administrator.
3. The employee shall have the right to be heard by the Administrator or representative.
4. Following such a hearing an employee may be dismissed or demoted if the Administrator finds adequate cause or reason.
5. The Administrator may suspend an employee without pay pending the outcome of dismissal proceedings.

Form 703

Utah Department  
of Employment SecurityCSRB  
Grievant  
Exhibit # 2Don Avery  
Chief of Contributions*Interoffice Communication*

Cleared for Release:

Date: September 13, 1991

TO: Terry Burns, UI Director

SUBJECT: Charles Kent

On May 1, 1991, I learned from a local office acquaintance that Charles had been indicted by a federal grand jury of fraudulently endorsing 10 US Treasury checks. The next day I discussed this with him and he assured me that he was not guilty. He explained that his brother who had been living with him had committed the forgery.

Charles has been under closer supervision since then and will continue to be until the issue is resolved. His duties have been restricted in order to reduce his handling of trust fund monies. During this time Charles has repeatedly told me that he was not the guilty party, and that his attorney has assured him he had nothing to worry about.

Now that he has pleaded guilty to the charges, I am concerned about Charles' continued employment in Field Audit. On September 9 I again discussed the situation with him. He still contends to be innocent and the only reason he pleaded guilty was upon the advice of his attorney. His attorney counseled him that pleading guilty to a misdemeanor should have no consequences upon his current employment. I disagree. Criminal forgery of any type, regardless of the degree of the crime, cannot be overlooked when considering the integrity of our auditors. I do not believe that it is in his or the agency's best interest to keep him working in Field Audit or Contributions. I do not want him in any position where there is the potential of handling or manipulating trust fund monies.

If his offense does not justify termination, I request that he be transferred elsewhere in the department. Your consideration in this matter is appreciated.

DA/gb

KENT.MEM



## Interoffice Communication

Prepared by:

Vince Iturbe *Vince Iturbe*  
Benefit Payment

Cleared for Release

CSRB  
Grievant  
Exhibit # 1

August 8, 1991

TO: Terry Burns, Director, Unemployment Insurance  
SUBJECT: Charles D. Kent

On Thursday, August 8, at 9:00 a.m., I attended the United States District Court, District of Utah, in regards to Charles D. Kent. A change of plea was introduced to Judge David Winder. The attorney for the United States Government was Mr. Gilson, the attorney for the defense was Mr. Bennett. A plea bargain was entered into whereas the original ten counts of misuse of Social Security funds involving the forging of United States Treasury checks was to be changed from a felony to a misdemeanor.

The plea bargain would involve full restitution of \$18,287. At the time of sentencing \$3,000 is to be paid, and during a probationary period the remaining \$15,287 is to be paid, plus interest. The probation period will be established by the judge. Mr. Kent is being charged with forging the signature of his deceased father, Mr. Charles L. Kent; therefore, defrauding the United States Government.

The judge made it clear that he would take this matter under advisement, but is not held to any plea bargain. The judge can still sentence Mr. Kent on the felony charge. The date for sentencing is November 1, 1991, at 8:00 a.m. in the United States District Court, District of Utah, 350 South Main, Salt Lake City, Utah.

If there are any additional questions, please feel free to contact me at 533-2081.

VI/jat

cc: Evan Mattinson  
Don Avery

Form 702



Norman H. Bangerter  
Governor  
Floyd G. Astin  
Administrator

**DEPARTMENT OF EMPLOYMENT SECURITY  
of the Industrial Commission of Utah**

140 East 300 South • P.O. Box 11249  
Salt Lake City, Utah 84147-0249  
(801) 536-7400  
FAX (801) 536-7420

CSRB  
Agency  
Exhibit #

December 3, 1991

Charles D. Kent  
Contributions & Collections

Dear Charles:

Disciplinary Decision

On October 4, 1991, Mr. Don Avery, Chief of Contributions, issued to you a Notification of Intent to Discipline, in which he advised you of his intent to recommend that you be disciplined by dismissal from this Department. You responded on October 23, 1991. On October 30, 1991, Mr. Avery advised you that he had considered your response and felt it necessary to recommend to the Administrator that you be dismissed from state service.

Upon receipt of Mr. Avery's recommendation of disciplinary action and your prior response to his intent letter, I carefully reviewed the information in both documents. You were subsequently notified that I would conduct a hearing on this matter on Friday, November 15, 1991. The hearing was held beginning at 2:00 p.m.

The issue in this matter is whether you should be dismissed from the Department and state service to advance the good of the public interest for noncompliance with professional standards adopted by this Department. Specifically, should you be dismissed for having been convicted of a crime of moral turpitude while employed by the Department?

Based on the information contained in Mr. Avery's Notification of Intent to Discipline and Recommendation for Disciplinary Action, and the additional information provided by you and Mr. Avery at the hearing, I hereby make the following:

**Statement of Facts**

1. On or about May 1, 1991, your supervisor, who at the time was Mr. Don Avery, learned that you had been indicted by a Grand Jury for the crime of

a five-year period and that you had absolutely no knowledge of the matter. Concerning your belief that your brother may have forged the checks, you stated yourself that the federal handwriting expert expressed the opinion that your brother could not have done the forgery.

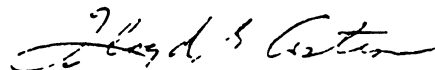
Perhaps equally important as your guilty plea was the fact that you failed to keep Mr. Avery informed of the progress of your case. You stated in the hearing that you didn't talk to Mr. Avery about your decision to plead guilty because a Department employee was in court when you entered your plea and you concluded that Mr. Avery would be told about it.

This failure to communicate occurred even though you were given specific instruction on the matter. In view of the instruction you were given and the importance of the matter to your job, I find it particularly difficult to understand why you would plead guilty to forgery without letting your supervisor or the Chief of Contributions know your intent. Your lack of communication and false denial on a matter so vital to both you and the Department naturally has caused management of this Department to lose confidence and trust in you.

Given the facts of your case, I have no alternative but to conclude that your act of forgery and failure to communicate honestly and openly with your supervisor has disabled you from continued effectiveness as an employee of the Department. Therefore, you are to be dismissed from the Department and state service for the good of the public interest pursuant to Section 67-19-18(1), Utah Code Annotated 1953, as amended. Your dismissal shall be effective at the close of business December 6, 1991.

If you disagree with this decision, you have 20 working days from the date hereof to file a grievance with the Career Service Review Board in accordance with its rules. You may contact Mr. Doug Olsen of this Department's Personnel Section or the Career Service Review Board, Room 1120, State Office Building, for further information concerning your right to grieve this decision.

Sincerely,

A handwritten signature in cursive script, appearing to read "Doug Olsen", written in dark ink.

Administrator

ld/PC3  
CDKDSSML



CSRB  
Agency  
Exhibit # 2

MINUTES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

           CENTRAL DIVISION

  X   NORTHERN DIVISION

RECEIVED  
NOV 1 1991  
OFFICE OF JUDGE  
DAVID K. WINDETT

           CIVIL HEARING

             X   CRIMINAL HEARING

DATE November 1, 1991

CASE NO. 91 NCR 34 W U.S.A. VS CHARLES D. KENT

           HON. ALDON J. ANDERSON            HON. BRUCE S. JENKINS   X   HON. DAVID K. WINDER            *DKW*

           HON. J. THOMAS GREENE            HON. DAVID SAM

DEPUTY CLERK Deana H. Scott COURT REPORTERS Ray Fenlon

APPEARANCE OF COUNSEL

James Gilson, AUSA

Wendell Bennett

Ronald Cushing, Probation Officer

CALENDARED FOR: IMPOSITION OF SENTENCE

Statements were made by Mr. Bennett, Mr. Kent and Mr. Gilson. Imposition of sentence was suspended and the defendant was placed on probation for a period of five years. All of the usual conditions of probation apply, including the following:

1. Not violate any laws, federal, state or local.
2. Report fully and completely with the Probation Office when they direct him to report.
3. Make restitution in the sum of \$18,207.00, \$3,000.00 of that amount is to be paid within ten days from today, the balance of \$15,207.00 plus interest at the rate of 5.42% over a term of five years while he is on probation.
4. Pay fine of \$2,000.00, to be paid at the rate of \$50.00 per month, in addition to the restitution, for a period of forty months. The money being timely paid is a condition of the defendant being out of prison.
5. Financial records are to be made available to the Probation Office, when requested.
6. Pay \$25.00 assessment fee.

Form 703

Utah Department  
of Employment SecurityDO. Avery  
Chief of Contributions

Prepared 1

CSRB  
Agency  
Exhibit #**Interoffice Communication**

Cleared for Release:

Date: October 4, 1991

TO: Charles D. Kent, Field Auditor

SUBJECT: Notification of Intent to Discipline

You are notified of my intent to recommend to the Administrator that you be disciplined through dismissal from this agency.

You are advised of this disciplinary action "to advance the good of the public interest" [Utah Code 67-19-18(1)], R468-11-1.3(a), and pursuant to the following under R468-11.1 for noncompliance with professional standards adopted by this Department. The specific reasons for my intent to impose this disciplinary action are:

On August 8, 1991 you appeared before Judge David K. Winder in the United States District Court for the District of Utah, case number 91-NCR-34W, and entered a plea of guilty to forging the endorsement "Charles L. Kent" on a United States Treasury check.

Since May 1, 1991 when I learned of your indictment, you have assured me of your innocence. I asked you to keep me apprised of the progress of your case, but at no time did you voluntarily do so. I repeatedly had to request status reports from you. You also failed to inform me of your August 8 court appointment and your intentions to plead guilty. During this entire period your actions have been less than helpful and your intent misleading.

Contributions employees, especially those handling Trust Fund monies, must have reputations for honesty and trustworthiness which are unquestionable. It is not in the best interest of this Department to have you working in such a responsible position as that of a Field Auditor subsequent to your admission of guilt to a criminal act of forgery.

Don Avery Don Avery, Chief of Contributions

I have read this notice of intent to discipline. I understand that I have the right to be heard and have until October 23, 1991 in which to respond in writing to the author of this letter.

Charles D. Kent Charles D. Kent Date 10-7-91

DA/gb  
KENT1.MEM

Employee responded in writing 10-23-91.

Don Avery Don Avery, Chief of Contributions Date 10-2

## UTAH DEPARTMENT OF EMPLOYMENT SECURITY

ACCOUNTANT 17EFFECTIVE OCTOBER 27, 1969

POSITION SUMMARY: Under the general supervision of an Accountant Supervisor, performs a variety of duties related to field auditing. Audits employer records to reconcile them with contribution reports. Collects delinquent contributions, interest levies, and penalty assessments. Conducts the Department's biennial status survey. Serves legal papers as required. Performs related duties as assigned.

EXAMPLES OF WORK PERFORMED:

1. Audits employer records to reconcile them with contribution reports. Conducts audit at the location where the records are kept. Audits payrolls, State and Federal tax returns, general ledger accounts and other records. In case of discrepancies, computes amounts due, determines interest, and collects or arranges for payment, or certifies entitlement to refund if applicable. Checks weeks worked and wages paid to verify eligibility of claimants for Unemployment Insurance. Instructs employers in the proper filing of reports. Conducts special audits of employer records in cases of known or suspected violations or misinterpretations of the Act.
2. Collects delinquent contributions, interest levies and penalty assessments. Makes collection at the time of contact with employer, arranges for payment at a later date, or conducts an inventory as a preliminary step in planning the legal seizure and liquidation of assets to satisfy the amount due. Researches various public and private documents in an effort to locate employers attempting to evade payment. Conducts investigations to locate hidden assets when necessary. Makes collections for other states under a reciprocal agreement.
3. Conducts the Department's biennial status survey. Contacts persons or companies who may be employing others to determine if they are subject employers as defined by the Employment Security Act. Contacts employers on an area basis. Personally visits new businesses and checks other accounts if there appears to be a change in status. Interviews employers, gathers facts and audits records. Fills out proper forms and sets up accounts when indicated. Computes contribution amounts due, interest, and penalties where required.
4. Serves legal papers as required. Receives warrants, garnishments, executions, summons, court orders and subpoenas for service in Salt Lake County. Files them with County Clerk's Office.

MINIMUM QUALIFICATIONS:

## 1. Education and Experience

- (a) Graduation from an accredited 4-year college or university, including or supplemented by at least 9 quarter hours in accounting, &

Doc. No. 2  
Arc. No.STATE OF UTAH DIVISION OF PERSONNEL MANAGEMENT  
APPROVED CLASS SPECIFICATIONS

I. Class Title and Grade: Field Auditor 21 Range: 0112 Class Code: 1362 Effective Date: 9-1-82 OT Code: STO EEO Code: 2

II. Distinguishing Characteristics:

This is a working level class with a probationary period of 6 months. Under general direction performs a variety of professional field auditing duties in the Utah Department of Employment Security. Employees in this class perform specialized auditing, investigating, collecting and related field duties under very limited supervision. They make appointments and schedule time according to assignment requirements. These employees have a working knowledge of the Employment Security Act, its related regulations and precedent cases. They serve legal papers and make determinations of wage credits for the claims section. They perform difficult auditing functions on extended field trips and contact employer and government representatives, lawyers and accountants on a regular basis

III. Examples of Work: (These are intended as general illustrations of the work in this class and are not all inclusive for specific positions)

Contacts employers to administer and enforce provisions of the Employment Security Act; gathers information, discusses findings and gives advice and instructions; examines and audits employer accounting records and other supporting documents to determine compliance with the Employment Security Act, rules and regulations, and judicial precedent; reconciles and corrects reports; locates and contacts employers to effect the collection of delinquent reports and contributions; interviews neighbors and various witnesses to trace employers who have moved; discusses accounts receivable with employers and arranges payment schedules for those in financial difficulty; performs investigations to determine the Unemployment Insurance tax status of new and existing employers; may examine records and documents as well as interview various employer representatives to establish employer subjectivity and liability; contacts employers, accountants, and others to determine wage data of claimants or to verify previously submitted wage information; audits employer and claimant records to investigate suspected fraud; seeks evidence of willful misrepresentation or collusion between claimants and employers; may be assigned periodic field trips into the outlying areas of the State; may investigate various governmental entities to determine their status under the Employment Security Act; may act in liaison with the Internal Revenue Service, the State Tax Commission and other governmental agencies in obtaining information to be used in the administration of the Act; performs other duties as assigned.

IV. Qualifications Statement:

A. Knowledges, Skills, and Abilities

duties. By his failure to keep Avery informed of his judicial status as directed, and by his later plea bargain (openly acknowledging his guilt to fraud), Kent breached the level of confidence and trust which the Department's officials had placed in him. Due to Kent's fiduciary capacity, this breach of confidence and trust constituted aggravated misconduct. Therefore, the Department was justified in dismissing Kent in order to advance the good of the public interest pursuant to §67-19-18(1).

4. The Department's *Supervisor Handbook* lists as a cause for dismissal: "Conviction of a crime involving moral turpitude." (Grvt. Exh. 1; Agency Exh. 4.) Appellant, who was not a supervisor or manager, had not received a copy of the handbook during his years of employment with the Department. Appellant averred that he had no knowledge of these professional standards prior to dismissal proceedings (T. 105). Admittedly, this handbook does not apply the term "professional standards," but it explicitly sets forth several grounds as dismissal for cause, including a conviction for a crime of moral turpitude. *Human Resource Management Rules* (July 1991 edition), at R468-11-1, states in part: "Noncompliance with these rules, departmental safety policies, professional standards adopted by a department, work place policies, . . . failure to advance the good of the public interest shall be cause for disciplinary action." (Emphasis supplied.) This provision of the *Human Resource Management Rules* is applicable to all career service employees, including Kent, regardless of whether one has personal knowledge of the rule or not. There are certain moral standards, such as integrity, trustworthiness, and honesty, which need not be written into an employer's policies and work place rules. The public employing agency may reasonably expect adherence to such unwritten universal moral standards, which if breached, would substantially tarnish an employee's reputation and strain if not rupture the employment relationship.

5. It is not relevant that Appellant had not received a copy of the Department's *Supervisor Handbook* prior to his dismissal. Proper conduct and professional standards include certain moral standards that do not need to be explicitly written and disseminated to each employee in the public work force. A serious offense in criminal law, such as forgery, for one who holds a position such as an Accountant, a Collections Officer, and a Field Auditor rises to a level of moral turpitude. The standard of moral turpitude need not be written as a specific agency policy, which would include every possible infraction, since a reasonable person would understand that such intentional wrongdoing and base

Olsen (Direct Examination By Mr. Zabel)

1 Q. And in what capacity?

2 A. Human resource manager.

3 Q. How long have you been the human resource  
4 manager?

5 A. One year two months.

6 Q. Are you familiar with the records  
7 concerning the Grievant, Mr. Charles Kent?

8 A. Yes, I am.

9 Q. Have you reviewed those records in the last  
10 day or so at my request?

11 A. Yes.

12 Q. And can you tell us the date Mr. Kent was  
13 hired and the job he was hired into?

14 A. He was hired on October the 9, 1984 as an  
15 Accountant 17.

16 Q. And is there a working title with that job;  
17 do you know?

18 A. At that time, I don't know. That was the  
19 official title that he was hired under.

20 Q. Okay. What status was he hired into?

21 A. It was a status we call TLS. That stands  
22 for time limited salary. At that time, individuals  
23 were hired on a -- it was a contractual period of  
24 time to perform certain duties for a limited period  
25 of time.

Olsen (Direct Examination By Mr. Zabel)

1 Q. Was that a career status?

2 A. Not at that time.

3 Q. Do you have a class specification with you  
4 for the job Mr. Kent was hired into?

5 A. Yes.

6 MR. ZABEL: We'd like to have this document  
7 marked as an exhibit.

8 HEARING OFFICER GUYON: That would be  
9 Number 5.

10 MR. ZABEL: We brought one just for you.

11 MR. DYER: Okay.

12 (Agency Exhibit No. 5 was  
13 marked for identification.)

14 HEARING OFFICER GUYON: This is being  
15 offered as Exhibit 5 after you have reviewed that,  
16 Mr. Dyer.

17 MR. DYER: I'm sorry. Which one is this?

18 HEARING OFFICER GUYON: This would be  
19 offered as Exhibit 5. I'll give you a minute to  
20 review and see if there is an objection.

21 MR. DYER: I haven't seen A-4. I've got  
22 A-1, 2 and 3.

23 HEARING OFFICER GUYON: I've got A-4 as  
24 this (indicating).

25 MR. DYER: Okay. I didn't mark it down in

Olsen (Direct Examination By Mr. Zabel)

1 MR. ZABEL: We'll submit that as evidence.

2 HEARING OFFICER GUYON: All right. This  
3 will be received if there is no objection.

4 MR. DYER: No objection.

5 HEARING OFFICER GUYON: That will be  
6 received as Exhibit A-5.

7 Q. (By Mr. Zabel) Was Mr. Kent ever changed  
8 to regular career service status?

9 A. Yes.

10 Q. When did that occur?

11 A. It was on January the 13th of '86. He was  
12 changed to career -- regular career service status.

13 Q. Was that in the same assignment as far as  
14 you can tell?

15 A. Yes.

16 Q. Was he later promoted to the position of  
17 field auditor?

18 A. Yes, he was.

19 Q. And do you know from the records when that  
20 occurred?

21 A. That occurred July 23rd of 1990.

22 Q. And do you have a class specification for  
23 that position, field auditor?

24 A. Yes. There is three copies of that.

25 MR. ZABEL: I'll ask that this be marked as



Avery (Direct Examination By Mr. Zabel)

1 A. Approximately three years.

2 Q. When did Mr. Kent come into your unit as a  
3 field auditor?

4 A. Approximately the first of -- first of  
5 1989, about January of '89.

6 Q. And do you know what position Mr. Kent  
7 worked in prior to coming into your unit?

8 A. He was a collection officer.

9 Q. Is that in the same cost center as the  
10 field audit unit?

11 A. Yes, contributions cost center.

12 Q. How did Mr. Kent come to be transferred to  
13 field audit?

14 A. We had a vacancy for a field auditor and he  
15 made application and I selected him.

16 Q. Were you familiar with his work prior to  
17 your selection?

18 A. Yes, I was.

19 Q. And can you explain how you are familiar  
20 with his work, how you first came to know Mr. Kent?

21 A. I first met Charles in 1984 when he applied  
22 for the job as -- with the Department. What we had  
23 at that time is, we had four vacancies. We had  
24 vacancies for the two field auditors and vacancies  
25 for two collectors, and a registry was prepared

Avery (Direct Examination By Mr. Zabel)

1 combining those requisitions so that all of the  
2 applicants were applying for both of the jobs, and I  
3 held the interviews in conjunction with Mr. Frank  
4 Shaw at the time and he selected two -- Mr. Shaw  
5 selected two collectors and I selected two field  
6 auditors from that register. That was my first  
7 meeting with Charles.

8 Q. So you knew about Mr. Kent right from his  
9 initial hire into the Department?

10 A. Yes.

11 Q. How well did Mr. -- well, excuse me. Let  
12 me back up.

13 I call your attention to Agency Exhibit  
14 Number 6, the class specification for Field Auditor  
15 21. Are you familiar with that class specification?

16 A. Yes, I am.

17 Q. And would you explain how the duties of  
18 that job relate -- well, let me back up again.

19 Would you explain what the unemployment  
20 compensation fund is?

21 A. The unemployment compensation fund is an  
22 accumulation of all the unemployment taxes that the  
23 employers in the State of Utah pay to our Department.

24 Q. And how do the duties of a field auditor  
25 relate to that trust fund?

Avery (Direct Examination By Mr. Zabel)

1           A.    The field auditors have the responsibility  
2           to audit employers, to verify what they have recorded  
3           on their quarterly reports and make assessments based  
4           upon those audits. They also have the obligation to  
5           contact employers who are delinquent and collect  
6           their unemployment -- their delinquent unemployment  
7           reports and delinquent taxes that are due on those  
8           reports, and they also have the obligation to  
9           actually contact employers who have filed their  
10          reports but who have not made their payments and  
11          collect the taxes that are in arrears. And all of  
12          the money that comes from those contacts will then  
13          eventually end up in the trust fund.

14          Q.    I show you two documents that have the  
15          title Performance Management Plan. Can you identify  
16          these documents?

17          A.    Yes. Those are documents that I prepared.

18          Q.    And are these documents specifically  
19          related to Mr. Kent?

20          A.    They're consistent with the position.

21          Q.    And, in fact, they have Mr. Kent's name on  
22          them; do they not?

23          A.    Yes, yes.

24          Q.    And do these documents indicate the  
25          objectives of his job as a field auditor?

Avery (Direct Examination By Mr. Zabel)

1 when he worked for Mr. Shaw?

2 A. The only thing that would differ there is  
3 that when he worked for Mr. Shaw, the determinations  
4 had already been made and the taxes were in arrears  
5 and he collected on those taxes that were in arrears.

6 Q. And as an auditor, what was the difference?

7 A. That was -- that was -- that was a primary  
8 duty of a collector. An auditor can also establish  
9 the liabilities and then collect on them.

10 Q. Would you explain who manages the  
11 unemployment compensation fund?

12 A. It's managed within the contributions  
13 division of the Department of Employment Security by  
14 our trust fund management unit.

15 Q. Where is the money kept?

16 A. It depends on where it's at in the process.  
17 Eventually it will end up in -- in -- in the  
18 Department's account with the United States  
19 Government.

20 Q. When you say eventually, is that a  
21 protracted time that the Department holds it before  
22 it sends it to the United States Government?

23 A. Right. We have a process where we collect  
24 the money, we deposit it in a clearing account and  
25 then it gets transferred into the trust fund.

Avery (Direct Examination By Mr. Zabel)

1 Q. And do you know how long it generally stays  
2 in the clearing account?

3 A. It's usually not much more than a two- or  
4 three-day turnaround at the most.

5 Q. So the money is fairly quickly  
6 transferred --

7 A. Yes.

8 Q. -- to the federal trust fund?  
9 Why is it transferred to the federal trust  
10 fund?

11 A. Because that's where we earn our interest  
12 on the trust fund monies.

13 Q. Is there any federal requirement that the  
14 money go to that fund?

15 A. Yes. They have very stringent regulations  
16 as far as keeping -- as far as getting the money  
17 through the process as rapidly as possible.

18 Q. Is the Department obligated, required by  
19 federal law or regulations to put the unemployment  
20 contributions into that federal fund?

21 A. Yes, yes. We have no option.

22 Q. With respect to Mr. Kent's performance as a  
23 field auditor, would you explain to the Hearing  
24 Officer what your observations were as his supervisor  
25 in general?

Avery (Direct Examination By Mr. Zabel)

1 A. Yes.

2 Q. Did he indicate what the indictment was for  
3 or what the newspaper article said?

4 A. He had conveyed the contents, and I asked  
5 him if he would please either mail or fax me a copy  
6 of the article.

7 Q. And did he do that?

8 A. Yes, he did.

9 Q. And what did you do then when you received  
10 the article?

11 A. I called Charles into my office and we had  
12 a discussion concerning whether or not he was the  
13 gentleman that they were -- that had been indicted  
14 and that the article was referring to.

15 Q. And how did Mr. Kent answer?

16 A. He said yes, he was the individual.

17 Q. And do you recall the nature of the  
18 indictment?

19 A. He was accused of fraudulently endorsing  
20 ten U.S. Treasury checks.

21 Q. What did you do then after he acknowledged  
22 that he was the same individual as the article  
23 referred to?

24 A. I asked him if -- if -- to give me a bit of  
25 an explanation as to how this came about and was

Avery (Direct Examination By Mr. Zabel)

1 there any merit to this, at which time he gave me a  
2 brief background of what had transpired and then  
3 professed his innocence.

4 Q. How did he profess his innocence to you?  
5 Do you recall specifically what he said?

6 A. He had said that he had had his brother  
7 living with him and it was his brother who had  
8 actually intercepted the checks and had forged them  
9 and cashed them, and that he was not the guilty party  
10 and he had no knowledge of his brother doing this  
11 during that period of time.

12 Q. Did you say anything further to him at that  
13 time?

14 A. At that point in time I told him I thought  
15 that, you know, I had never dealt with a situation  
16 such as this before and I would need some further  
17 guidance from management on how to proceed, but in  
18 his best interest and my best interest, especially  
19 since this had now been made public notice in the  
20 newspaper, I would like to -- I restricted his duties  
21 as a field auditor to office duties, that he could  
22 perform in the office.

23 Q. What kind of duties would that have  
24 included?

25 A. Primarily working with the telephone to

Avery (Direct Examination By Mr. Zabel)

1 secure delinquent contribution reports, working the  
2 telephone to secure status reports from employers who  
3 had not registered with us, and anything else that he  
4 could do that would still contribute to the operation  
5 of the field audit, would still fall within his  
6 responsibilities and job description but would  
7 basically keep him at a lower profile.

8 Q. Did he handle any trust fund monies in that  
9 capacity?

10 A. I would say that he probably still did  
11 handle some trust fund monies in that sometimes the  
12 checks will come in addressed to the field auditor as  
13 opposed to just coming in in the general mail, and  
14 it's possible that some did cross his desk.

15 Q. Would you say that he was under closer  
16 supervision by reason of these restrictions?

17 A. That was -- yes, he was. That was also the  
18 intent, so that I could again hopefully serve  
19 everybody's interest.

20 Q. At the time you placed these restrictions  
21 on Mr. Kent, did you say anything to him about why  
22 you were doing it?

23 A. Again, I reiterated that I had some  
24 concerns about the image that -- that we had worked  
25 so hard to improve as far as being state employees



Avery (Direct Examination By Mr. Zabel)

1 and being auditors. We had done a great deal of work  
2 with customer service, we had done a great deal of  
3 work on public relations, and I felt that there was  
4 some concerns that I had to take into consideration  
5 in that if I had knowingly allowed someone who was  
6 indicted by a federal grand jury for fraud to have  
7 access to trust fund monies on a regular basis or to  
8 have access to employers' confidential financial  
9 records, it had potential embarrassment both to him  
10 and to the Department.

11 Q. Did you say anything to Mr. Kent about the  
12 possible impact of this indictment and any potential  
13 conviction on his job?

14 A. Right. At that time I don't believe he had  
15 an attorney, but I told him that he needed to be  
16 aware of, and that at any point he secured legal  
17 Counsel, they needed to very strongly take into  
18 consideration the fact that if he were to plead  
19 guilty or were found guilty, it could have impact  
20 upon his employment. I did not know exactly what  
21 that impact would be, but common sense told me that  
22 it would have implications.

23 Q. And did you articulate that concern to him  
24 in writing or just verbally?

25 A. No. It was just verbally.

Avery (Direct Examination By Mr. Zabel)

1 Q. Do you recall whether that was at the time  
2 that you told him that his duties would be restricted  
3 to office work?

4 A. That was at that time and repeatedly during  
5 the course of this situation.

6 Q. Did you give him any instruction with  
7 respect to the indictment and the prosecution that  
8 was then pending?

9 A. I don't quite understand that question.

10 Q. Perhaps I can rephrase it.

11 Did you ask Mr. Kent to keep you informed  
12 of the progress of the case against him?

13 A. Yes, I did. I asked him if -- if  
14 throughout this process, if he would keep me updated  
15 as to what was transpiring so that I was aware of --  
16 of the situation.

17 Q. Now, let's walk through the chronology then  
18 of some of the events that followed at this point in  
19 time when you placed him on restricted office duties.  
20 How long was he restricted to office work?

21 A. Okay. Initially I verbally restricted him  
22 to -- to office responsibilities on approximately May  
23 1st, and at that time I then verbally asked my  
24 supervisor, who is chief of distribution at that  
25 time, Dean Kimber, for some guidance in the matter.

Avery (Direct Examination By Mr. Zabel)

1 nothing that he was -- the office duties did not  
2 entail anything that was not covered in his PD  
3 requests, position description questionnaire.

4 Q. How did Mr. Kent react to this decision to  
5 restrict his duties?

6 A. He was understanding.

7 Q. Did you have any further discussion about  
8 his case at that time?

9 A. Other than what's happening, where are we  
10 at on this, and the continued reassurance that there  
11 was nothing to worry about.

12 Q. And this conversation and memo were on or  
13 about May 20, '91?

14 A. Yes, sir.

15 Q. How long did he remain on restricted  
16 duties?

17 A. He stayed on restricted duties until his  
18 dismissal.

19 Q. Why was Mr. Kent placed on restricted  
20 duties? Would you explain that?

21 A. Field auditors are a very high profile  
22 position within our Department. In fact, they --  
23 they're really the only contact that most of our  
24 employer community has with our Department on a  
25 regular basis, and they're placed in a position where

Avery (Direct Examination By Mr. Zabel)

1 they're continually handling trust fund monies, not  
2 uncommon, cash.

3 They also are very often in the employers'  
4 offices where they have access to all the employers'  
5 confidential financial information, bank information.  
6 It's not uncommon to be handed a checkbook that  
7 has -- still has -- that has checks in it. It's not  
8 uncommon for -- and this I have a hard time  
9 understanding -- quite often, just to have a  
10 checkbook where the checks are presigned. And I did  
11 not feel that it would be exercising good judgment on  
12 my part to be putting someone who had been indicted  
13 of -- by a federal grand jury into such an  
14 environment and have the potential of someone, as  
15 remote as it may be, having read this article or  
16 through some way aware that Mr. Kent had been charged  
17 with this crime and having to respond, then having  
18 that taxpayer go to either the administrator,  
19 Governor, or even, worst case scenario, the media and  
20 having this thing blown all out of proportion.

21 Q. Was there any potential in your mind that  
22 this kind of access to employers' financial records  
23 by someone under indictment, was there potential to  
24 cause harm to the credibility of the Department in  
25 the eyes of employers?

Avery (Direct Examination By Mr. Zabel)

1 to you with this information voluntarily or did you  
2 ask him about it?

3 A. No. I had to ask him about it.

4 Q. Did Mr. Kent talk to you from May 20th on  
5 about his job duties? Did he ever have any  
6 complaints?

7 A. Never received any complaints. There was  
8 probably a periodic exchange between us as far as his  
9 job duties and the workload that he had and to  
10 just -- the sort of thing that would go on between a  
11 supervisor and an employee.

12 Q. And when those kind of discussions  
13 occurred, did you ask him further about the progress  
14 of the case?

15 A. There were future discussions, yes, about  
16 the progress of the case. It's not something that I  
17 was, you know, every day walking in the office and  
18 calling him into my office and asking for an update.  
19 But when a week or two would go by and, you know, I  
20 would at that point ask for some input as far as what  
21 was transpiring.

22 Q. At any time did he ever come to you and  
23 say, "I need to bring you up-to-date on my case," or  
24 anything to that effect?

25 A. Not once.

Avery (Direct Examination By Mr. Zabel)

1 Q. In fact, you had to ask him every time what  
2 was going on?

3 A. Yes.

4 Q. How did you learn that there was some kind  
5 of a court appearance to be made on August 8, 1991 by  
6 Mr. Kent?

7 A. To the best of my recollection, I received  
8 a phone call from our benefit payment control  
9 supervisor, Mr. Evan Mattinson, asking if I was aware  
10 that Charles had a court appearance, and I was not  
11 aware of such an appearance. I knew that one was  
12 scheduled sometime in the fall, but that was -- that  
13 was the extent of it.

14 Q. How did you know that it was scheduled in  
15 the fall sometime?

16 A. I believe one of our conversations where I  
17 had asked for progress, I believe that Charles had  
18 mentioned that to me.

19 Q. But he did not come to you at any time  
20 prior to August 8th to let you know that he had a  
21 court date?

22 A. No, he did not.

23 Q. Do you know what happened at that August  
24 8th court appointment?

25 A. I understand that he had pled guilty and I

Avery (Direct Examination By Mr. Zabel)

1 Q. Do you know what those treasury checks were  
2 for?

3 A. Charles had told me that they were checks  
4 that had been -- that were intended for his father  
5 who also was Charles Kent.

6 Q. What kind of checks?

7 A. I assume retirement checks, Social  
8 Security.

9 Q. What happened after you learned that he had  
10 pled guilty, and specifically, was sentenced in  
11 November?

12 Let me back up if I may.

13 MR. ZABEL: We'd like to formally offer  
14 Exhibit Number 2.

15 HEARING OFFICER GUYON: Okay. Is there an  
16 objection to Exhibit Number 2?

17 MR. DYER: My only objection is, I think  
18 our position, and I'll just make it now so I can pose  
19 a continuing objection, our position is that because  
20 of the fact that we don't think the conviction is a  
21 basis to sustain termination under the items we set  
22 forth in our brief, we don't believe that the  
23 document is relevant, but other than that, we would  
24 have no objection.

25 In other words, our position is that

Avery (Direct Examination By Mr. Zabel)

1 conviction of a crime of moral turpitude is not in  
2 compliance with state law so this is not relevant  
3 evidence, but other than that, there is no objection.

4 HEARING OFFICER GUYON: With that  
5 stipulation, we will receive that into evidence.

6 MR. DYER: Before you go, Mr. Avery, do you  
7 have any problem with me just posing that continuing  
8 objection rather than interrupt you?

9 MR. ZABEL: That's fine. Feel free to  
10 interrupt, too.

11 MR. DYER: All right.

12 Q. (By Mr. Zabel) All right. Mr. Avery, if  
13 you would explain what happened then after his guilty  
14 plea and sentencing?

15 A. Let's see. He pled guilty in August and I  
16 had some verbal discussions with -- with my  
17 supervisor and also the personnel department as to,  
18 you know, what we should do from here.

19 On September the 13th I addressed a letter  
20 to Terry Burns, the UI director, where I spelled out  
21 what basically had transpired, and concluded my  
22 letter that if his offense did not justify  
23 termination, that I be requested that he be  
24 transferred elsewhere in the department.

25 Q. And why did you make that request?



Avery (Direct Examination By Mr. Zabel)

1           A.    It was obvious now that I cannot have an  
2 individual who had pled guilty to a federal offense  
3 of forgery handling trust fund monies.

4           Q.    And what happened then after you sent that  
5 memo to Mr. Burns?

6           A.    I received a verbal response from Mr. Burns  
7 to proceed with the termination process.

8           Q.    And did you do that?

9           A.    Yes, I did.

10          Q.    How did you do that?

11          A.    On October 4th I believe, I gave -- I gave  
12 Charles a written notification of intent to  
13 discipline through dismissal.

14               MR. ZABEL:  If we may see Exhibit 1, Your  
15 Honor.

16               Let's try Exhibit 3..

17               HEARING OFFICER GUYON:  Okay.

18               MR. ZABEL:  I apparently put these in  
19 different numerical order.

20          Q.    (By Mr. Zabel)  This is Agency Exhibit  
21 Number    Mr. Avery.  Do you recognize it?

22          A.    That's the notice of intent to discipline.

23               MR. ZABEL:  We'll offer that into evidence.

24               MR. DYER:  Subject to my continuing  
25 objection, I have no other objection.

Avery (Direct Examination By Mr. Zabel)

1 HEARING OFFICER GUYON: Okay. That will be  
2 received as Exhibit 3.

3 Q. (By Mr. Zabel) And do you know what  
4 happened thereafter?

5 A. Charles responded on October 23rd with a  
6 written appeal to my intent whereas he said he'd like  
7 to stay in the field audit, but if that wasn't  
8 possible, he would consider work else -- he would  
9 consider work elsewhere in the Department.

10 Q. All right. And from there, what happened?  
11 Did his response change your recommendation?

12 A. No. I was obligated then on October 30th  
13 also to generate a written appeal response stating  
14 that I had reviewed his written response and that I  
15 was continuing with the process, and at that point, I  
16 generated a recommendation for disciplinary action  
17 through dismissal to the administrator, Floyd Astin.

18 Q. Do you know what happened after you sent  
19 that recommendation to Mr. Astin?

20 A. Charles filed a Career Service Review Board  
21 grievance form grieving the recommendation.

22 Q. And thereafter?

23 A. And then on November 15th, there was a  
24 hearing in the administrator's office to -- it was a  
25 dismissal hearing.

## Avery (Direct Examination By Mr. Zabel)

1 Q. And was Mr. Kent dismissed as a result of  
2 that hearing to your knowledge?

3 A. Yes. On December 3rd Floyd Astin issued a  
4 disciplinary decision resulting in termination.

5 MR. ZABEL: That's all the questions I  
6 have.

7 CROSS-EXAMINATION OF DONALD AVERY

8 BY MR. DYER:

9 Q. Mr. Avery, you referred to a memo dated  
10 September 13th of '91. Do you have that there in  
11 your file that I can look at? I don't have a copy of  
12 that. The one of Terry Burns is the one I'm  
13 interested in.

14 MR. DYER: Could we take a break for a  
15 moment so we can get a copy of this perhaps?

16 HEARING OFFICER GUYON: That would be fine.  
17 Let's take a five-minute break.

18 (There was a short break taken.)

19 (Grievant's Exhibit No. 2 was  
20 marked for identification.)

21 HEARING OFFICER GUYON: Let's go back on  
22 the record.

23 Q. (By Mr. Dyer) Mr. Avery, we have marked  
24 here as Exhibit G-2 a copy of the memo which you  
25 graciously provided us that you wrote to Terry Burns

Avery (Cross-Examination By Mr. Dyer)

1 on September 13, 1991; is that true?

2 A. Yes, sir.

3 MR. DYER: I'd move for admission of G-2.

4 MR. ZABEL: No objection.

5 HEARING OFFICER GUYON: All right. That  
6 will be received as G-2.

7 Q. (By Mr. Dyer) Now, Mr. Avery, in this  
8 memo, as I read it, there is no reference in this  
9 memo about any concerns disclosing the August 8th  
10 hearing date. Is that a fair statement?

11 A. Yes.

12 Q. Prior to becoming chief -- do you remember  
13 the exact date you became chief of contributions?

14 A. Approximately August of '91.

15 Q. So it was real close in time to when this  
16 hearing occurred?

17 A. Uh-huh.

18 Q. That's a yes?

19 A. Yes, sir. I'm sorry.

20 Q. Oh, that's okay.

21 And Mr. Kimber was the chief prior to you  
22 taking that job?

23 A. Yes, sir.

24 Q. And he retired?

25 A. He resigned.

## Avery (Cross-Examination By Mr. Dyer)

1 Q. Do you know why he resigned?

2 A. No, I do not.

3 Q. When he resigned, did he pass on any  
4 information to you that Mr. Kent would have provided  
5 to him concerning this case?

6 A. He never -- I have not spoken to him since  
7 he left.

8 Q. So when he left, he didn't give you any  
9 sort of briefing on where things were prior to  
10 leaving?

11 A. No.

12 Q. Did you, in fact, know on August 8th that a  
13 court hearing had occurred that day?

14 A. I knew about it that morning; I believe  
15 either that morning or the previous afternoon when I  
16 received a call from Mr. Mattinson.

17 Q. When you talked to Mr. Mattinson, do you  
18 know if Mr. Mattinson arranged for someone to be  
19 present at that hearing from the Department?

20 A. Yes, he did. He arranged for a gentleman  
21 by the name of Vincent Iturbe to be present.

22 Q. Mr. Iturbe apparently did appear?

23 A. Yes, he did. I got a copy of a memorandum  
24 I believe that he generated to -- I'll have to see  
25 who he generated it to.

Avery (Redirect Examination By Mr. Zabel)

1           A.    Well, within the framework that I had  
2           restricted his duties; in other words, restricting  
3           him to the office. I had a concern about his ability  
4           to do the work in the field. Not necessarily his  
5           ability to do it. He could still do the work because  
6           he was trained and qualified, but because of what was  
7           transpiring, I felt very uncomfortable in letting him  
8           out of the office.

9                    I rationalized that by putting myself in an  
10           employer's position. Would I want a state  
11           representative who had either pled or been  
12           convicted -- who had been indicted, who had pled or  
13           had been found guilty of a crime of this nature,  
14           would I want to open up my records to him, give him  
15           access to my most confidential information? Of  
16           course I would not.

17           Q.    As far as the ultimate outcome prior to  
18           August 8th, did you have any reason to believe that  
19           Mr. Kent had, in fact, committed fraud against the  
20           Federal Government?

21           A.    No, I did not.

22           Q.    And why didn't you?

23           A.    I believed him.

24           Q.    When you say you believed him, again, he  
25           made assurances to you that he was innocent?

## Avery (Redirect Examination By Mr. Zabel)

1 A. Yes, he did.

2 Q. And when he pled guilty, how did that  
3 change your attitude?

4 A. I quite honestly felt betrayed.

5 Q. Was your primary concern at that point with  
6 Mr. Kent's pleading guilty or was it his failure to  
7 voluntarily keep you informed on what was happening?

8 A. I think both of them. The fact that he had  
9 consistently assured me from April 30th that he was  
10 innocent and then goes in and pleads guilty, be it  
11 even to a lesser charge, I found that very  
12 distressing, and also the fact that -- that  
13 throughout this period, I was the one having to  
14 approach him to get updates as to what was  
15 transpiring.

16 Q. Why did you find it distressing?

17 A. Because of the fact that we had been  
18 friends for -- I had not only been his supervisor.  
19 Before I became his supervisor, we were friends, and  
20 we were still friends after I became his supervisor,  
21 and for him to profess innocence, and I sincerely  
22 believed that he was innocent through the  
23 conversations that we had had, and then for him to go  
24 into court and plead guilty, that just distressed me.  
25 At what point then do I believe Charles in the future

Avery (Redirect Examination By Mr. Zabel)

1 on any issue?

2 Q. So in other words, did it cause you to los  
3 confidence in to what extent you could rely on him?

4 A. Yes, it did.

5 Q. Did you at that point begin to question his  
6 honesty as it related to his work?

7 A. No, I did not.

8 Q. Did you at that point question in your own  
9 mind whether you could rely and trust him?

10 A. I did.

11 MR. ZABEL: I have no further questions.

12 HEARING OFFICER GUYON: Any Recross?

13 RECROSS-EXAMINATION OF DONALD AVERY

14 BY MR. DYER:

15 Q. In your mind, was this a decision involving  
16 Charles' trust and honesty or more of a potential  
17 credibility problem to the Department?

18 A. I think the two were interrelated. They  
19 both apply.

20 MR. DYER: I have nothing further.

21 HEARING OFFICER GUYON: Okay. Thank you.  
22 We will excuse you as a witness and let you sit back  
23 as Department representative. Thank you.

24 The next Department witness.

25 MR. ZABEL: Could we take another short



Astin (Direct Examination By Mr. Zabel)

1 Agency Exhibit Number 1. Can you identify that?

2 A. Yes. That is my decision issued in this  
3 matter.

4 Q. Did you conduct a hearing to consider the  
5 recommendation for dismissal of Mr. Kent?

6 A. I did.

7 Q. And is this decision evidenced in Agency  
8 Exhibit Number 1 the result of that hearing?

9 A. That is correct.

10 Q. And that was your formal decision on the  
11 matter?

12 A. Yes, that's correct.

13 MR. ZABEL: We'll offer it into evidence.

14 MR. DYER: I have no objection.

15 HEARING OFFICER GUYON: Okay. That will be  
16 accepted into the record.

17 Q. (By Mr. Zabel) Would you explain your  
18 reasons for determining to dismiss Mr. Kent?

19 A. Yes. It consisted of a number of things.  
20 I guess the thing that really triggered the thought  
21 process of reaching the decision that I did make, I  
22 guess the document actually speaks for itself, but in  
23 reaching the decision I made, I guess what triggered  
24 it was the idea that there was a plea of guilty by  
25 Mr. Kent in regards to a false claim made against the

Astin (Direct Examination By Mr. Zabel)

1     treasury, and then taking that guilty plea and the  
2     nature of the facts that led up to that plea and  
3     applying those -- that circumstance to the duties he  
4     had with the Department at that time as a field  
5     auditor, trying to determine whether or not this  
6     would interfere with his work, and in my judgment, I  
7     felt that it would, because the work that he was  
8     doing with working as a field auditor, going out with  
9     employers, auditing their books, determining whether  
10    or not they had committed any wrongdoing with the  
11    State of Utah or that their books were accurate and  
12    reporting of their taxes, and also acting as a  
13    collection agent for the Department, collecting  
14    monies on occasion and bringing those monies back to  
15    the Department, I felt that the nature of the -- of  
16    the guilty plea or of the action that was performed  
17    that led to the guilty plea were contrary to the  
18    professional standards that this particular position  
19    required with the Agency and that it would interfere  
20    with his ability to perform his duty in that  
21    capacity.

22               I felt that the high trust and expectations  
23    of those working as field auditors were such that it  
24    would -- it would jeopardize his ability to perform  
25    the job. However, in addition to that, the thing

Astin (Direct Examination By Mr. Zabel)

1 that weighed upon my mind is the fact that he had  
2 been advised and asked to keep the Department fully  
3 involved with the matter as to what was transpiring,  
4 as we found out through the newspaper that this  
5 charge was brought against him by the U.S.  
6 Government, and that was by accident. It wasn't  
7 brought to our attention at the time that we found  
8 out. And that he was asked to keep us informed of it  
9 and failed to do so, us being to his supervisory  
10 line, and he failed to do so. As a matter of fact,  
11 they had to approach him each time as the information  
12 was found out as to the nature of the charge and  
13 where it might be at any given point.

14 And I guess finally, at the hearing that I  
15 conducted after going through these very -- these  
16 steps of review in my own mind as to try to determine  
17 what disciplinary action should be taken, I was taken  
18 back somewhat by the -- the demeanor or the approach  
19 that Mr. Kent used. I didn't find any remorse. I  
20 didn't find any moral responsibility being expressed  
21 by Mr. Kent. As a matter of fact, each time that the  
22 issue was discussed, Mr. Kent seemed to take the  
23 position that it was somebody else's fault. He  
24 didn't take any responsibility upon himself as to  
25 what had actually happened. He made it clear to me

Astin (Cross-Examination By Mr. Dyer)

1 employee, but most of the changes -- most of what  
2 goes on are changes, and they're generally posted on  
3 a bulletin board, and that so employees, if they have  
4 any concerns about it, they can make recommendations  
5 about it.

6 Q. Now, under this Dismissals for Cause  
7 provision, you have, "conviction of a crime involving  
8 moral turpitude," which is what you cited in your  
9 decision?

10 A. Correct.

11 Q. Can you tell me when that policy was  
12 adopted and disseminated to employees that that is a  
13 basis for dismissal?

14 A. To my knowledge, this goes back many years.  
15 I don't -- I'm not aware of any -- any dates on that.

16 Q. So can you tell me with certainty whether  
17 or not that information is actually conveyed to each  
18 employee?

19 A. Each employee is made aware when they  
20 come -- employee evaluation when they first come to  
21 the Department that this information is available as  
22 to what standards are in employee handbooks and  
23 supervisor handbooks. Employee handbooks are given  
24 to all employees and supervisor handbooks are given  
25 to all supervisors for review by an employee.

Astin (Redirect Examination By Mr. Zabel)

1 attitude that should be prevalent of a person working  
2 in the capacity he was working in. It caused me  
3 great concern, as I mentioned, that there would be no  
4 remorse, no owing up to what had happened, even  
5 though there was a guilty plea on the matter.

6 It certainly weighed in my mind, along with  
7 these other factors, other conviction of the -- it  
8 was just an environment that I was very, very  
9 uncomfortable with. I didn't feel that we had an  
10 employee that would put forth the concern that we  
11 have felt in this area of needing -- have someone  
12 working with the employees that had those kind of  
13 traits, that were straightforward and had an honest  
14 rapport with the Department and were willing to work  
15 with the Department. The mistake had been made. I  
16 didn't see any willingness to work with the  
17 Department and to try to work out the problem at any  
18 point. It was almost like it will go away, it didn't  
19 happen.

20 Q. Thank you.

21 Did Mr. Kent ever state to you either in  
22 his hearing or at any other time that he had told the  
23 chief of contributions at that time, Mr. Dean Kimber,  
24 that he had an August 8th hearing date?

25 A. No. As a matter of fact, that did not come

Astin (Redirect Examination By Mr. Zabel)

1 out. The questions were asked as to why he didn't  
2 inform his supervisor, and that was never mentioned  
3 he did inform anybody. That was specifically asked  
4 of him.

5 Q. Did Mr. Kent say to you at any time that he  
6 had told Mr. Kimber or anybody else that he intended  
7 to plead guilty at that August 8th date?

8 A. Again, that was asked and there was no  
9 indication of doing that. As a matter of fact, the  
10 frustration was expressed by Mr. Avery as to the fact  
11 that he let him think that right up to the point till  
12 he actually made the plea in court, we had no  
13 knowledge of it. It was a surprise to Mr. Avery that  
14 came out of the hearing and there was no rebuttal  
15 against that at all. As a matter of fact, it was  
16 acknowledged.

17 MR. ZABEL: I have no further questions.

18 HEARING OFFICER GUYON: Any Recross?

19 RE CROSS-EXAMINATION OF FLOYD ASTIN

20 BY MR. DYER:

21 Q. This testimony that you gave about what was  
22 said in that hearing, you are giving your  
23 conclusions?

24 A. That's correct. It was not recorded. It  
25 was a very informal hearing, although it was open to

Kent (Direct Examination By Mr. Dyer)

1 it.

2 Q. So at that point in time, you didn't feel  
3 like there was any need for it?

4 A. No.

5 Q. What was the date of the check that you  
6 pled guilty to; do you recall?

7 A. September 3, 1986.

8 Q. How much did that check involve?

9 A. \$310.

10 Q. Why did you plead guilty to that?

11 A. Seemed like the thing to do. They had  
12 taken handwriting samples from me on two occasions  
13 and the result was officially inconclusive. But when  
14 you're talking with these people, there is always a  
15 constant threat that they are going to reopen the  
16 felony charges, and the felony charge would have  
17 killed me. I thought a misdemeanor wouldn't hurt.

18 Q. Why did you think that? Was that as a  
19 result of consultation with your lawyer?

20 A. Well, my attorney assured me that he had  
21 handled other cases for other state employees and a  
22 misdemeanor wouldn't hurt.

23 Q. Who was your lawyer on that?

24 A. Wendell Bennett.

25 Q. Did the cost factor of what it would cost

Kent (Cross-Examination By Mr. Zabel)

1           A.    No.  Up until that time, I was dealing  
2 strictly with Mr. Kimber.  I'd go into his office,  
3 open up my file and talk to him.

4           Q.    You were dealing strictly with Mr. Kimber?

5           A.    Yes.

6           Q.    Not with Mr. Avery?

7           A.    Pretty much with Mr. Kimber.

8           Q.    Did Mr. Avery ask you to keep him informed?

9           A.    Not specifically, no.

10          Q.    Not specifically?

11          A.    No.

12          Q.    That's your testimony under oath?

13          A.    Yes.

14          Q.    Why did you keep Mr. Kimber informed, if  
15 you did?

16          A.    Because I thought he was a friend and I  
17 thought he was the one I should talk to.

18          Q.    Did you tell him that you intended to plead  
19 guilty on August 8th?

20          A.    No, because he left prior to -- no.  It was  
21 right about that time, but no.  I didn't tell anybody  
22 I was going to plead guilty.

23          Q.    How many times did you talk to Mr. Kimber  
24 about it?

25          A.    At least half a dozen.



## Kent (Cross-Examination By Mr. Zabel)

1 A. Originally ten.

2 Q. And, in fact, checks had been charged, or  
3 at least the Government was alleging that checks had  
4 been charged for at least several years prior to  
5 1986, hadn't they?

6 A. For five years, yes.

7 Q. A five-year period. When you pled guilty,  
8 did the Judge ask you if you were pleading guilty  
9 because of the plea bargain or because you were  
10 guilty?

11 A. They asked me -- they tried to pin down  
12 plea bargain. They asked me several questions.

13 Q. Did the Judge specifically ask you if you  
14 were pleading guilty because, in fact, you were  
15 guilty?

16 A. Yes, I think he did.

17 Q. And what did you answer to that?

18 A. Yes. My attorneys instructed me to.

19 MR. ZABEL: I have no further questions.

20 HEARING OFFICER GUYON: Any Redirect?

21 MR. DYER: Just one follow-up.

22 REDIRECT EXAMINATION OF CHARLES D. KENT

23 BY MR. DYER:

24 Q. You told the Judge that, in fact, you were  
25 guilty because you were instructed to do so by your

Avery (Rebuttal - Direct Examination By Mr. Zabel)

1 Q. Again, what were your instructions to  
2 Mr. Kent about keeping you informed?

3 A. Please, keep me updated on the progress of  
4 the situation so that I'll know how to respond, I'll  
5 know how to react, so that nothing comes as a  
6 surprise to me.

7 Q. Did you ask him to keep Mr. Kimber informed  
8 instead of --

9 A. No, I did not. I was his immediate  
10 supervisor. This thing should have been handled  
11 through me, unless Mr. Kimber had told me otherwise  
12 and I was not told such.

13 MR. ZABEL: I have no further questions.

14 MR. DYER: Two things I want to follow up  
15 on real quick.

16 CROSS-EXAMINATION OF DONALD AVERY

17 BY MR. DYER:

18 Q. Mr. Zabel asked you if you knew about  
19 potential allegations in January, February of 1991  
20 and you responded yes. I think you meant 1990  
21 because it was before the --

22 A. Let me just see. When did he transfer to  
23 Clearfield? Do you have the date?

24 MR. KENT: March 1st of '90.

25 A. So then it would have been '90, right.